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PRINCIPLES

OF

CORPORATION LAW

BY

JOSEPH C. FRANCE

Lecturer on the Law of Corporations in the University of Maryland

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SECOND EDITION

BALTIMORE:

M. CURLANDER,

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PREFACE TO SECOND EDITION.

The Codification of 1908, chapter 240, and the Uniform Stock Transfer Act (1910, chapter 73), have, to a considerable extent, rationalized the Maryland statutory law of corporations,—with the result that much discussion in the former edition of purely local interest, has become useless. In this revision, I have tried to keep in view the original purpose, namely, to give to the student of corporation law a knowledge and understanding of its characteristic principles and problems. And by characteristic, I mean those principles and problems which are presented because, and only because, the rights and duties involved are those of a fictitious person:—one that is made and not born. Doubtless, in carrying out this purpose, I have made mistakes both of omission and of commission; but the intention was good, and the available time was limited.

For much and valuable assistance I am indebted to Samuel Want, Esq., of the Baltimore Bar,—to whom entire credit is due for the Appendix of Forms and the Index.

J. C. F.

January, 1914.

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PART I.

THE NATURE, DEFINITION AND CLASSIFICATION OF CORPORATIONS.

CHAPTER I.

THE CORPORATE IDEA AND ITS PLACE IN THE LAW.

"The opinion of Manwood, C. B. was this as touching corporations; that they were invisible, immortal and that they had no soul, and therefore no *subpoena* lieth against them because they have no conscience nor soul; a corporation is a body aggregate; none can create souls but God; but the king creates them and therefore they have no souls. They cannot speak nor appear in person but by attorney; and this was the opinion of Manwood, Chief Baron, as touching corporations." *Tipling v. Pexall*, 2 Bulstrode, 233.

§ 1. **The law and the person.** Practically considered, law in a free state is the body of rules enforced by its courts of justice. These rules fall under one or the other of two descriptions: They define legal (that is, enforceable) rights: and so make up the body of substantive law; or they deal with remedies: and under such topics as pleading, practice, and evidence constitute the body of procedural or so-called adjective law. The rights which are thus defined and protected are rights of persons[1], and at the

[1] The law deals with things only as they are related in ownership to some person. A diversion of Blackstone's critics is to point out that his "rights of things" arises from translating *jus* as "right," instead of "law."

beginning of any inquiry into the nature and attributes of a corporation arises the necessity of grasping clearly the meaning of "person" as a legal conception. In present usage, the word is nearly synonymous with human being; but formerly many men were not persons and today many persons are not men. In Roman law, from which we get both the word and the idea, *persona*[1] denoted legal status and a capacity for rights and duties. The man, for example, who was under the *patria potestas* had no personality; he was not *sui juris*. As a member of the family group, his rights were merged in those of the pater-familias, who was also responsible for his delicts.[2]

§ 2. **Artificial persons.** But the right to acquire personality was not limited to men. An office or dignity could be personified: that is, treated as the possessor of rights entirely distinct from those of the individual incumbent. Illustrating from later times, the Crown has a personality distinct from that of the king; Crown lands are not the king's lands. Moreover, a group of individuals associated for a common purpose could be personified: that is, treated as a legal unit with rights and duties distinct from those of the group members. When, long after the classical period of the Roman law, legists and canonists were forming theories, the terms natural person and artificial (*ficta*) person were employed to express the contrast between real and

[1] *Persona* (*per*, through; *sonare*, to sound) originally meant a mask; hence, a character on the stage; hence, any representative character. A man having several legal capacities was said to be *homo qui plures sustinet personas*. We have something of the idea in personage; and a parson is *persona ecclesiae*,—he impersonates the church.

[2] Maine's Ancient Law, ch. 5.

ideal possessors of personality; and these terms are in use today.[1] In the progress of society, the artificial person has played and still is performing an indispensable part: The modern State,[2] the executor, the trustee and the corporation all illustrate the vitality of the conception. On the other hand, the distinction between natural person and man has nearly disappeared; but such phrases as "good and lawful" men, "free and legal" men point to a time when some men were not persons and when men were not equal before the law.[3]

§ 3. **The corporation.** That form of artificial personality with which we are directly concerned is the personified group or corporation aggregate: the collection of natural persons which, when formally made by the law into one body, becomes a distinct legal unit, having a name, existence and capacities of its own. The element of corporateness thus distinguishing a group of men *associated* for a common purpose, from a similar group *incorporated* for a similar

[1] The term *persona ficta* is credited to Pope Innocent IV (Sinibaldo Fieschi) who was a contemporary of Bracton (1250) and has been called "the father of the modern learning of corporations." See Maitland's Introduction to Gierke's Political Theories of the Middle Age; also Pollock & Maitland History of the English Law, Vol. 1, ch. 2, sec. 12, where it is said: "To the Church, modern law owes its conception of a juristic person and the clear line that it draws between the corporation aggregate and the sum of its members." As to the fiction theory and its reception into the common law—see *post* §4, n. 1.

[2] "The greatest of artificial persons, politically speaking, is the State." Pollock Jurisprudence, p. 113.

[3] According to Bracton, "the villein being under the control of his lord, may like the monk, be considered as civilly dead." For an account of the different sorts of men who in the early law were not persons, see 1 Pollock and Maitland's History of English Law, ch. 2.

purpose, may be illustrated by contrasting a body corporate with a partnership. The corporation must derive its existence from the state and not merely from the agreement of the incorporators; the group name is not merely a collective name for the group members; corporate ownership is not co-ownership; the corporation can sue and be sued by a member,—who may be guilty of trespass or theft as to its property; a member is not, merely as such, its agent; its rights and liabilities are not his; and its identity and life may continue, although the members come and go in a perpetual succession. The converse of each of these propositions is true of a partnership.

§ 4. **Early English corporations.** When Manwood, Chief Baron, delivered the picturesque opinion above quoted, the kinds of corporations aggregate known to the law were few. The religious communities in the abbey, monastery and priory; the dean and chapter of the cathedral church; the university and the school; the hospital, the borough and the gild—these were the representative types, and many of them existed before there was any English law of corporations. With such types before them and borrowing from Rome,[1] lawyers and judges had formulated a theory which

[1] Whether the Roman or fiction theory of corporate personality was ever "received" into the common law, has been the subject of much recent discussion,—for which see: Geldart, Law Quarterly Review, January, 1911; Pollock, Law Quarterly Review, April, 1911, and Machen, Harvard Law Review, February and March, 1911. According to the opponents of the fiction theory, the corporation is a person in law which, while juristic or artificial, is not fictitious; it is a group acting corporately and having a real will. This view would solve in a rational way questions with which the courts are still struggling,—particularly questions of corporate powers. But so far as the weight of American authority goes, the question is not

found its classical expression in the *Case of Sutton's Hospital* (Coke: 10 Rep. 23a. Anno. 1613). According to this theory, the corporation aggregate is "created" by king or parliament, and in the absence of prescription must be able to show an actual grant of the right to exist; a pretended corporation is an offense against the king. Being a juristic and not a natural person, its capacities and liabilities are subject to all the limitations deducible from its incorporeal nature. As early as the thirteenth century, Pope Innocent had declared that a body corporate was incapable of committing either sin or tort. No act of any importance could bind it unless evidenced by the seal common to all the members; being incarnate only in the common seal, it could not "manifest its intention by any personal act or oral discourse"; no subpoena could be served upon it, but its goods were distrained upon, until an attorney was appointed, under the common seal, to appear for it; the members were in no sense owners of the corporation's property, nor could they become such by winding it up; and upon the expiration or forfeiture of corporate life, all debts due by or to the juristic person were extinguished, its real estate reverted to the grantor, and its personal property vested in the Crown as goods without an owner.[1]

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whether the fiction theory has been received but the extent to which it has been discarded. Two of its corollaries still flourish: (1) Corporations are created and exist only by State concession; and (2) they have only the capacities and powers which are expressly conferred upon them. At the same time, there is a growing tendency to modify the fiction theory and deal directly with the group members when the ends of justice so require: *post*, §17.

[1] "Maryland in the first half of the eighteenth century had put out circulating bills as currency on the security of shipments of tobacco, the proceeds of which were invested in stock of the Bank

§ 5. **Later and modern forms.** If the right to be a corporation had been limited to such groups as those above mentioned, the metaphysical theory might have continued to mark the bounds of corporate powers and disabilities. But in Coke's day there was coming into prominence a new form of activity, exemplified in the great colonizing and trading companies, such as the East India Company, the Hudson's Bay Company, and the various corporations by which the English colonies in America were planted. While in legal theory these bodies were governmental agencies of the Crown and had large political powers, nevertheless their

of England, held by trustees for that purpose. The title of the State of Maryland came in question before the English court of Chancery some years after the Treaty of Peace. If the doctrine of public law, that a change in the political government of a people does not affect its proprietary rights and obligations, was to apply, the equitable interest in the shares belonged to the State. It was held by Lord Loughborough that it did not apply. 'The old government of Maryland,' he said, 'a government of a singular species, existing by letters patent, in some degrees similar to a corporation possessing rights in England, must sue in England and ought to be regulated by the law of England under which it has its existence.' Under that law in his opinion, the new State could not be regarded as its lawful successor in title. Lord Eldon, in referring to this case some years later, summarized it as deciding 'that the property in question which was stock in a London corporation held by English trustees, as it belonged originally to a corporation existing by the king's charter, was not to be transferred to the State of Maryland after the Treaty of Peace in 1783, as that State did not exist by the king's authority: but constituted *bona vacantia* and fell to the Crown.'" Yale Bi-centennial Publications: Two Centuries Growth of American Law, page 264, citing *Barclay v. Russell,* 5 Vesey, 424; *Dolder v. Bank,* 10 Vesey, 356. In *Agnew v. Bank,* 2 H. & G. 479 (decided in 1828), the court said: "It is not necessary that we should express any opinion on the question how far the debts of a corporation are extinguished by the dissolution of its charter."

prominent and avowed object was the private gain of the adventurers. Then, and especially in this country after the Revolution, came the prominence of companies having no political powers, but of more or less public utility: Banks, Turnpike, Canal, Insurance, and Railroad Companies, formed, so the old charters used to run, "as well for the public good as for the private interest of the incorporators." Finally, and within a comparatively recent period, came the day of the business corporation, having no public relations and being practically an incorporated partnership,—the type which either alone or in the combination loosely called a "trust" largely holds the field.

§ 6. **Sources of difficulty in corporation law.** When the making of contracts, buying, selling, and getting gain came to be ordinary manifestations of corporate activity, many doctrines of the older law began to swing at their moorings and then to drift. It became difficult, for instance, to maintain the rule that only by its common seal was a corporation bound; or that it was incapable of committing and being sued for torts; or that the rights of creditors were extinguished by its dissolution. And when the limited powers and logical disabilities of an incorporeal person were urged as a shield against the consequences of a bad bargain or of a wrongful act, it was hard to discriminate between the soulless entity that could do no wrong and the natural members who both could and did. Law is practical, and the metaphysical theory had to give way; but because law is conservative, the changes have been gradual and neither uniform nor consistent. And this is the explanation of much of the confusion that exists in the subject to-day. In theory, the body corporate is still a special creation of limited powers; and in practice, the difficult questions are those involving the limitations of abnormal personality. It

will be seen hereafter that the answers to such questions depend largely upon the extent to which, at the particular time and place, the courts and the legislature have modified the metaphysical theory and have assimilated the rule for the artificial person to that which would govern a natural person under similar circumstances. To illustrate: You may say with substantial accuracy that at the present time the corporate seal is needed only where a seal would be essential to the validity of a similar act if performed by a natural person; and that a corporation is liable for the torts of its servants and agents where a natural person would be liable under similar circumstances; and that when the ends of justice require, courts will disregard the corporate form and deal with the natural members. Such a statement, however, is not the expression of any principle, but merely a generalization from the cases in which, step by step, old precedents have been sacrificed to changed social conditions.[1] The present unsystematic state of the law results largely from the adaptation of scholastic ideas to new and commercial uses. The old conception was valuable because it contained the needed elements of limited liability and continuous succession.[2]

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[1] The halting nature of the progress is shown by the appearance of the ghost of the old theory in *Williams Co. v. Baking Co.*, 86 Md. 476 (1897). Here the court determined that although a corporation might sue as plaintiff, at law or in equity, without affixing its corporate seal to the declaration or the bill of complaint,—it could only answer in equity under its seal. The ghost was laid by the Legislature of 1900; and the Code 1911 (art. 16, sec. 215) now provides that "it shall not be necessary for the answer or any other pleadings of a corporation to be under the corporate seal."

[2] For an interesting account of the development and growth of private corporations in this country, see Chapter X of Two Cen-

turies Growth of American Law. Chancellor Bland in *McKim v. Odom*, 3 Bland, 407, is quoted for the proposition that no private corporations were chartered by the Colony of Maryland. It is also shown that prior to the year 1800 there were only eleven charters granted by the State, namely: to The Susquehanna Canal Company, The Potomac Company, The Bank of Maryland, The Maryland Insurance Fire Company, The Bank of Columbia, The Baltimore Equitable Society, The Baltimore Insurance Company, The Bank of Baltimore, The Maryland Insurance Company, The Pocomoke Company and the Chesapeake and Delaware Canal Company. "Among the moneyed companies with considerable capital, but unincorporated, which were engaged in active business during the colonial period, several of the most important were in Maryland. The Patapsco Iron Works Company, sometimes called The Baltimore Company, was an important concern there as early as 1731. Another was the Potomac Company or The Potomac Canal Company, formed for improving the navigation of the Potomac River in 1762 and finally incorporated in 1784; and a third also deserves mention, the partnership known as the Principio Company."

For an account of the number of charters granted by the legislature after 1800 and also of those taken out under the general incorporation law, see Transactions of the Maryland State Bar Association (1901): Annual Address of the President, Stevenson A. Williams.

CHAPTER II.

DEFINITION AND CLASSIFICATION.

§ 7. **Difficulty of definition.** Because the original conception of a corporation has changed and shifted with the new uses to which it has been adapted, no satisfactory definition is possible. We find Chief Justice Marshall, in the leading case of *Dartmouth College v. Woodward,* 4 Wheat. 518, calling it "an artificial being, invisible, intangible and existing only in contemplation of law." But this language conveys no more real information than that of Chief Baron Manwood, above quoted, and, like it, seems to imply some divine light in the inquirer that will enable him to identify and distinguish the corporation from other legal conceptions.

§ 8. **Description.** There is little difficulty, however, in distinguishing the corporation from the voluntary association. The association is a group unit: "such a collection of individuals as may be represented by a word in the singular number"[1]; it embodies a common purpose; and it may have some characteristics, more or less recognized by law, of personality. But the corporation is something more than this. If formally created, it *is* a person, and as such it

[1] xix Harvard Law Review, 351.

is distinct from, and not merely the alias of, the members; and in its rights and liabilities they are in nowise implicated.

§ 9. **Early classification.** To the lawyer of the seventeenth century, all corporations were either sole or aggregate, according as the members were one or more than one; all corporations, whether sole or aggregate, were ecclesiastical or lay, according as they were of the church or not; and all lay corporations were either civil or eleemosynary. The differences expressed by these distinctions were of importance in their day. At the present time, the terms are nearly void of legal significance, but some account of them is necessary.

§ 10. **The corporation sole.** This singular term was employed to obscure a plain meaning. Artificial personalty in the civil law could be acquired as well by a group of rights, conceived of as adhering in some office or dignity, as by a group of individuals, conceived of as a unit and incorporated for a definite purpose. The latter was the corporation; the former was merely another species of artificial person. But the English lawyers reasoned about the personified office as though it belonged to the law of corporations; and they called the incumbent, and sometimes the office, a corporation sole. A mass of subtle learning, now happily obsolete, grew up around the attempt to distinguish between this and the true body corporate. It was said, for example, that the parson needed no charter because he was "incorporate at common law"; that the corporation sole must act by a corporate seal but could not convey to himself as an individual; that he could take a deed of land but not a gift of chattels to go in succession; and there was much debate as to whether, being a fictitious

person, he could be excommunicated.[1] The function performed by the conception was useful enough. It was important to distinguish between Crown rights and the king's rights; between the property of the bishop which went to his heirs and that of the bishopric which vested in his successor. But the name was a mistake: "It might have been better to have given them some other designation, for except the incapacity to purchase in mortmain, very few points of corporation law are applicable to them."[2]

§ 11. **Ecclesiastical corporations.** There was a time when the difference between corporations of the church and lay bodies was full of legal consequences. The conflict between Church and State over questions of jurisdiction and property fill many pages of English history. The immunity of the religious body and its members from the jurisdiction of the king's courts; the right to hold property free from the burdens of feudal tenure; the power of the pope to create corporations; the right to be governed by the ecclesiastical law, with its appeal to Rome—these were vital questions. In this country, all incorporated religious bodies are private corporations owing their existence and rights as such to some legislative act.[3]

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[1] Grant on Corporations, sec. 626; II Blackst. Comm. 431; *Terrett v. Taylor,* 9 Cranch 43; *Overseers v. Sears,* 22 Pick. 122; Pollock on Contracts, 116.

[2] I Woodesson, 262. By statute in Maryland (Act of 1894, ch. 50) the Roman Catholic Archbishop of Baltimore is made a corporation sole with capacity to take in succession both real and personal property.

[3] For religious corporations, generally, and the Vestry Acts,—see Code (1911) Art. 23, sec. 329 and compare *Baltzell v. Church Home,* 110 Md. 262.

§ 12. **Lay corporations.** In the old classification, lay corporations were either civil or eleemosynary. The former were created "for the better government of the members," and the two types were the borough and the gild. Eleemosynary bodies were incorporated charities, and these were also of two types, the hospital and the school.

The borough is comparable with the modern municipal corporation, but the resemblance, as will be presently noted, was in form only. The gild was an association invested with rights, local but more or less monopolistic, over certain trades and crafts: and it has disappeared with the progress of industrial liberty.[1] The peculiarity of eleemosynary corporations lay principally in the power of control and regulation exercisable by the founder and his heirs. This right was called visitation, and the subject developed a considerable amount of law, which has little, if any, application in this country. Corporations are still formed for charitable and educational purposes, but the founder, if any, has in modern law no right of control except in so far as he is a member of the corporate body. The old power of visitation survives only in the modern and more limited right of the State and its courts to interfere in cases of abuse or misuse of the charter.[2] There is, however, one peculiarity of the

[1] For a good account of the Gild Merchant and the Crafts Gild, see Translations and Reprints, published by the Department of History of the University of Pennsylvania, Vol. 2, page 1. Encyc. Brit. (11 Ed.) Vol. 12, p. 14. For the Borough, see *post* page 15, note 1.

[2] "The founder and his heirs and in default of heirs, the Crown, is the visitor of all corporations which have been endowed with an endowment for a purpose which the law calls eleemosynary, which includes schemes for promoting education. In general the first gift is the foundation of the institution and he who gives the land is the founder." Grant on Corporations, 517. And see: *Case of*

earlier law which remains; we still apply to charitable bodies that immunity from liability for tort, which was once a characteristic of all corporations.[1]

§ 13. **Modern classification.** In modern law, corporations are classified according to their relation to the state, and in this aspect they are public, private or *quasi*-public in their nature. The public corporation is one chartered for governmental purposes solely—such as the city, the incorporated town, the board of county commissioners. Private corporations are those formed for the gain or benefit of the members or for purposes which do not affect the public right. The third kind, more accurately called the public service corporation, is formed primarily for the gain of its members, but yet to accomplish a purpose more or less affected with a public interest. The importance and the reason for the new classification lie in the degree of control exercisable by the state over the members of the several classes. The charter of the public body may be imposed, altered or repealed and its affairs regulated by the legislature, without reference to the wishes of the community interested. The private corporation, in legal theory, is a party to a contract between the state and it; and while the state may interfere in cases of abuse or misuse, it cannot, in the absence of a power expressly or impliedly reserved when the charter was granted, repeal it or regulate the corporate business.[2] The vital distinction between the public

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Sutton's Hospital, 10 Rep. 23a; *Guthrie v. Harkness,* 199 U. S. 148; *Visitors and Governors of St. John's College v. State,* 15 Md. 330.

[1] See *post,* §84.

[2] See Chapter XIX, *post.*

and the private corporation is that the former never acquires any contractual rights against the state which created it.[1]

The public service or *quasi*-public body stands in an intermediate position. A railroad company, for example, is organized primarily for the gain of the incorporators; its charter embodies a contract with the state and as such is to be respected; but because its privileges are essentially monopolistic, it owes to the community a duty not owed by the private corporation. The latter may choose its customers and fix its prices. The *quasi*-public body is bound to give to all who come reasonable service at reasonable rates; and the state, through its legislature, has the right to regulate the service and the rates, subject to the control of the courts on the question of confiscation.[2]

§ 14. **Forms of public corporations.** It is not always easy to determine whether a particular body is a public cor-

[1] Herein lies the contrast with the borough of the older law. By virtue of its charter purchased from the king or feudal lord upon whose domain the town had grown up, it claimed and exercised the power of genuine self-government. The charter was, in legal theory, beyond the repealing power of the king or parliament. The borough had its own courts, applied its own customs and modes of trial and no freeman could be impleaded in any court outside the liberties. See Encyclopedia Britannica, "London." The modern law of public corporations is an American creation which has been more or less adopted in England by the Municipal Reform Act of 1835. "Blackstone in treating the subject of corporations, nowhere distinguishes between public and private corporations." Two Centuries Growth of American Law, 239.

[2] See Chapter XIX, *post*. In *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15 (1877), it was held that the reasonableness, *vel non*, of a rate is a legislative and not a judicial question. The court, however, referred to the fact that the same question was then pending before the Supreme Court of the United States. There, the contrary and now the controlling conclusion was reached.

poration. To be such, it must be a state agency; but some state agencies are not incorporated, and some corporations in which the state has an interest are not, on that account merely, agencies of the state.

First. The fact that for fiscal purposes and for the administration of justice, the state is made up of territorial divisions does not, without more, make the inhabitants of such divisions bodies corporate. The legislature may expressly confer corporate personality upon them, and then they are true corporations, with such powers as the statute gives. These powers may be limited, as in the case of counties and school districts, or they may be large rights of self-government, such as are commonly possessed by towns and cities. There may, however, be state agencies not expressly incorporated, but nevertheless endowed by the creating statute with powers which can best or only be exercised corporately. To such bodies is given the name of *quasi* corporations, and as to them the rule is that for the purposes defined in the creating statute, their status is that of true public corporations; they are such by implication. The question whether a particular body may sue, be sued and otherwise act "as if" incorporated, depends for its answer upon the legislative intent as interpreted by the courts. The question is largely procedural, i. e.: Whether acts should be done and suits brought by or against the body in the group name or in the names of the group members described as constituting the particular state agency.[1]

[1] Compare *O'Neal v. School Commissioners*, 27 Md. 227; *School Commissioners of Wicomico v. School Commissioners of Worcester*, 35 Md. 201; and *Brotherton v. Police Commissioners*, 49 Md. 495. See also *Levy Court v. Woodward*, 2 Wall. 501; *Hill v. Boston*, 122 Mass. 346; and *Town of Bloomfield v. Bank*, 121 U. S. 121. The

The right to sue and the liability to be sued depend, of course, upon the creating statute; and this is so whether the state agency is a true corporation, a *quasi* corporation or no corporation at all.[1]

Second. The fact that the state has an interest in it, however great, does not necessarily make a corporation public. The state may be the largest shareholder in a bank; it may have contributed part or all of the endowment of an educational institution; but unless the corporation is an agency of the government and under its control, it is not a public corporation.[2] In *St. Mary's Industrial School v. Brown*, 45 Md. 310, the validity of an appropriation made by the Mayor and City Council of Baltimore in favor of the appellant depended upon whether it was a public corporation. The court held in the negative, notwithstanding the fact that the institution was organized for the purpose of "fostering, reforming and educating the pauper children of the City, and thus relieving the City of an expense that would otherwise be entailed upon it"; and notwithstanding

older law saw no difficulty in dealing with unincorporated communities as group units. In the time of Charles II, one Pinckney recovered judgment on the Statute of Hue and Cry against "The men inhabiting the East Hundred in the County of Rutland." The defendants pleaded in the group name; and the sheriff levied upon the taxable holders of the Hundred. 3 Saunders Reports, Cases 61 and 67.

[1] *Weddle v. School Commissioners*, 94 Md. 342; *Moore v. State*, 47 Md. 467.

[2] *Bank of the United States v. Planters Bank*, 9 Wheat. 907; *Railroad Co. v. Anne Arundel County*, 103 U. S. 1; *Regents v. Williams*, 9 G. & J. 365; *Brady v. State*, 26 Md. 290; *Jackson v. Walsh*, 75 Md. 315; *Clark v. Maryland Institute*, 87 Md. 658.

the further fact that both the State and City were represented in the board of trustees.[1]

§ 15. **Forms of private corporations.** For practical treatment these are of two descriptions: With and without a share capital or capital stock. The stock corporation is usually an association for gain; its members are the shareholders, and membership goes with share ownership as a matter of right. In these particulars the public service corporation belongs to the private type. The corporation with no capital stock has usually an element more or less co-operative or social; and membership is normally a matter of election and not of right. This classification, however, is convenient rather than exact. Conceivably, a corporation may be formed with both a stockholding and a non-stockholding membership.[2]

§ 16. **Group units which are not corporations.** The corporation is a person in law whose existence, rights and liabilities are distinct from those of the group members. The common law recognized only individuals and corporations as entities,[3] and accordingly refused (as it still refuses) to adopt the mercantile usage in which the firm is treated as an artificial person. But between the corporate and the individual entity there may be *statutory* forms of association which in many respects act corporately. And there are

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[1] On the other hand, in *County Commissioners v. Hospital for the Insane*, 62 Md. 127, the appellee was held to be a public corporation, and as such exempt from taxation. For a valuable collection of cases relating to the status of State institutions, see 29 L. R. A. 378; *Thomas v. Trustees*, 195 U. S. 207.

[2] Compare Code 1911, art. 23, sec. 154.

[3] Harvard Law Review, xv 311.

many *voluntary* forms of association—such as societies, clubs, unions and the like—which make no claim to incorporation. Some difficulty and much confusion exist as to the legal status of these groups and their members.

§ 16a. **Statutory associations.** Of these a typical form is the "joint stock company or association," which exists in England and in some of the States but has never been authorized in Maryland. The best general description is that of Lord Justice Lindley: "Indeed it may be said that the law of unincorporated companies is composed of little else than the law of partnership, modified and adapted to the wants of a large and fluctuating number of members."[1] The extent of the modifications and adaptations are, of course, determined by (and they vary with) the authorizing statutes. Invariably there is a share capital divided into transferable shares,—so that membership is not personal, nor does the death of a member work a dissolution. Usually it is provided that suit may be brought by or against the association, and that title may be taken and held either in the name of some designated officer or in the group name; but unless the statute otherwise expressly enacts, the members are personally liable for the company's debts.[2] Confusion ensues when a joint stock company is a litigant outside of its own state. In *Edwards v. Linoline Co.*, 168 Mass. 564,[3] it was held that a Pennsylvania statute providing for suit in the group name had no extra-territorial force; and that in Massachusetts the association must be sued as

[1] Lindley on Partnership, Wentworth's Ed., Vol. I, p. 5, Vol. II, ch. 5.

[2] See preceding note and 17 Am. & Eng. Ency. 636.

[3] Also reported in 38 L. R. A. 791. The opinion contains a full and clear discussion of the subject.

a partnership. In the federal courts it is held that a joint stock company is not a corporation within the jurisdictional rule governing diverse citizenship.[1]

§ 16b. **Voluntary associations.** These include types and examples that are older than corporation law;[2] and they are normally the possessors of rights and property which are impressed with a purpose, and which belong to the purpose rather than to the group members. If the common law theory controls, namely, that a voluntary association is not an entity, then (1) no suit can be maintained in the group name; (2) the members are liable for the association's liabilities; (3) and they hold the associated assets as tenants in common but impressed with the common purpose. But the common law theory, in denying artificial personality to voluntary groups, has never adequately fitted the facts. To meet the many difficulties which a strict application of the theory would entail, the courts have from time to time ignored it; and at the present time there is much to be said for "the frank recognition of the corporate personality of voluntary associations."[3] The law, however, is in a state of confusion. It is generally held: (a) Voluntary associations for *profit* are, for the purposes of procedure and as regards the individual liability of the members,—partnerships. (b) In associations not for gain, a representative action, so called, may be brought by or against some of the members as representatives of the whole body;

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[1] See *Thomas v. Ohio State University Trustees,* 195 U. S. 207 and the cases therein reviewed. Compare also *Insurance Co. v. Massachusetts,* 10 Wall. 566.

[2] See the instructive case of *Ponce v. Roman Catholic Apostolic Church,* 210 U. S. 296.

[3] Harvard Law Review, xxv, 580.

but, in the absence of statute, the association cannot sue or be sued in the group name. A judgment against the association in a representative action can be collected out of the group assets only; but the decisions differ as to whether the members are also liable individually to suit and judgment at the plaintiff's election. The reasonable view seems to be that the member, merely as such, does not pledge his credit or incur responsibility for the obligations, in contract or in tort, of the association; and further, that persons dealing with the officers, as such, are presumed to look to the group assets for payment.[1] (c) The weight of authority still denies to the voluntary association such personality as would enable it to acquire and convey title in the group name. The members hold as tenants in common for the common purpose; consequently, in the absence of statute, a member cannot be guilty of theft of the common property. The association's property rights can be and usually are protected by means of trustees.[2]

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[1] Lindley on Partnership, Vol. I, chap. 1, sec. 5. "It is a mere misuse of words to call such associations partnerships; and if liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association." See also Harvard Law Review, xxv, 583; 25 Am. & Eng. Ency., 1129.

[2] In *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (1901 A. C. 426), it was held that a trade union registered under Act of Parliament but not incorporated, could be sued in its registered name and had so much of a corporate character as to subject it at least to liability to injunction and payment of damages out of the common fund. In *Littleton v. Wells & McComas Council*, 98 Md. 453, a voluntary association was held liable to suit at law in the group name. It was said: "An unincorporated society

§ 17. **One-man companies; Ignoring the corporate fiction.** It has been held that if all the shares are vested in one owner, the corporate existence is thereby suspended.

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or association was regarded at common law as a partnership, so far as its rights or liabilities were concerned, and suits could not be maintained by or against it in the name of the society or association, but the members composing it were the proper parties. * * * Sec. 415 of Art. 23 of the Code of 1904 (being sec. 215 of ch. 471 of the Acts of 1868) provided that 'It shall be sufficient in any suit, pleading or process, either at law or in equity, or before any justice of the peace, by or against any joint stock company or association, to describe the said joint stock company or association by the name or title by which it is commonly known, or by or under which its business is transacted.' " Upon this statute and an earlier case construing the same it was further said: "The statute does not take away the right existing at common law to sue the members of an unincorporated association, but the creditor has the option to sue either the association or the members, and when the suit is against the former a judgment obtained can only affect its joint property." This language, however, was probably not intended to convey the idea that the members of a voluntary association, not for gain, are as such responsible for its obligations. In *Snowden v. Crown Cork & Seal Co.*, 114 Md. 658, the court took a long step forward. It was there held that the statutory right of a voluntary association to sue in the group name "presupposes the right to acquire and possess in the same capacity the interests which a suit might protect." Accordingly, a transfer of stock by gift *inter vivos* to a voluntary association with a fluctuating membership, was upheld. The case of a testamentary gift was distinguished, but the language is broad enough to include real estate conveyances. The Act of 1908, revising the corporation laws of the State, changes the words "joint stock company or association," which were contained in the Act of 1868, to "corporation" (Code 1911, art. 23, sec. 88); and it is probable that the former words in the Act of 1868 were used technically as meaning a "company or association" having a joint stock, and not a voluntary association. It is worthy of note that a voluntary association having the capacity to acquire and vindicate rights in the group name, has practically all the elements of corporate personality.

The shares may be re-distributed and the corporation revived.[1] Again, it may happen that a single person holds all the shares, except those registered in the names of his nominees for the purpose of maintaining the organization. In such cases, may the rights and liabilities of the corporation be treated as identical with those of the sole or dominant owner? Again, if a corporation sells out its business and, with the assent of its principal stockholders, enters into a lawful covenant against future competition with the vendee, does the covenant bind the stockholders (who have assented but not personally covenanted) or a new corporation formed by them? These questions involve and illustrate the modern doctrine of "ignoring the corporate fiction"; and the fiction has sometimes been needlessly invoked and mistakenly applied. According to the weight of authority and reason, neither the sole owner of the corporate stock nor a combination of all the owners have any title to the corporate assets which they can convey. Dominant ownership, whether it be fifty-one or ninety-nine per cent. of the shares, does not of itself make such owner responsible for the debts of the corporation or prevent him from competing with other creditors in the distribution of its assets. It is true that the sole or dominant owner may so conduct himself as to incur personal responsibility; but the doctrine of fraud or estoppel is usually sufficient to meet such cases. A person knowingly dealing with a corporation has notice of limited liability; if the shares are paid up it can make no difference to him whether they are held by few or by many persons; and if money has been loaned to the corporation by a stockholder, it is immaterial whether the latter

[1] *Swift v. Smith*, 65 Md. 428; *Louisville Banking Co. v. Eiseman*, 94 Ky. 83, 19 L. R. A. 684; II Morawetz Corp., sec. 1009.

be the holder of few or of many shares. And so, if a purchaser of a corporation's good will and assets desires to secure himself against the future competition of the individual shareholders, he can easily stipulate for such result and not assume that it is included in the covenant of the corporation.[1]

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[1] *Hall's Safe Co. v. Herring, &c. Safe Co.*, 146 Fed. 37. And see generally, *Warren's Cases on Corporation Law*, ch. 3; *Salomon v. Salomon & Co.*, L. R. (1897) A. C. 22. In *Swift v. Smith*, 65 Md. 428, a mortgage of corporation chattels made in his own name by the sole owner of the shares, was upheld against a creditor of the revived corporation. In this case, which has been criticised (*Parker v. Bethel Hotel Co.*, 96 Tenn. 255; *Louisville v. Eiseman*, 19 L. R. A. 684), the creditor had actual knowledge of what was in fact an equitable mortgage; and the decision was right. But the view of sole ownership taken by Judge Irving is contrary to the great weight of authority and would nullify the recording laws. In *Pott v. Schmucker*, 84 Md. 535, the trustee of a dominant shareholder (who held all but four shares and in reality owned these) was denied the right to prove the shareholder's claim against the assets of the insolvent corporation in competition with its other creditors. It was said that a creditor "in a proper case and in furtherance of the ends of justice, may treat the debtor corporation and the individual owning all its stock and assets as identical." The court nevertheless held the corporation to be a distinct entity and decided that the trustee of the "individual owning all the stock and assets" was not entitled to the assets of the corporation. The facts (pp. 554-556) make a strong case for estoppel, and the decision could have been rested on this ground. See further, *Tompkins v. Sperry*, 96 Md. 560; *Re. Bauernschmidt*, 101 Md. 162; *Day v. Postal Co.*, 66 Md. 369.

PART II.

HOW AND WHEN CORPORATE LIFE BEGINS.

CHAPTER III.

THE CREATION OF A CORPORATION.

§ 18. **The creator.** In the still prevailing theory, corporate personality can exist only by an affirmative grant of the sovereign power. Historically, there were in England unchartered groups with the essential incidents of corporations before the time when this rule of law became crystalized; and later, when these bodies came before the courts, their corporate status was maintained by the fiction of prescription. Originally, the corporate franchise involved, as the etymology suggests, a freedom or liberty; a remission by the donor of some right and the acquisition by the donee of some immunity. The corporations which vexed the early lawyers were communities, and the essential element of a franchise was the right of self-government and freedom from the tax, toll and jurisdiction of the king or feudal lord. In modern days the franchise to be a corporation has hardly any trace of its original nature; but the old theory remains and corporate personality must still be derived from state concession.

§ 19. **Mode of creation.** In this country,[1] the creating act originally took one and only one form, namely, a special

[1] "They (the lawyers of Edward IV's day) demand that incorporatedness shall have some definite and authoritative commencement; the corporation does not grow by nature; it must be made

law providing that certain named individuals should, upon prescribed conditions, become a body corporate under the name, for the purpose, and with the powers set forth in the statute. This was called the charter; and when its terms and precedent conditions were by the incorporators accepted and performed, the life of the artificial person began. Hostility to corporations is more or less of a popular feeling, and the method of creating them by special charter fell into disfavor. This method not only permitted favoritism, but it consumed the time of the law-making body. The sentiment gradually gathered strength that the right to incorporate should be limited to a few defined purposes and, as thus limited, thrown open to all. The result was that, at periods differing in the several states, general incorporation laws were passed, and at the same time constitutional restrictions adopted, limiting the power of the legislature to grant special charters. The essential scheme of a general corporation law is to permit individuals to associate for defined purposes and to engender a body corporate by executing and recording a certificate (variously called the articles or memorandum of association) in some prescribed form. Such certificate is usually required to be submitted to an executive or judicial officer, who certifies its conformity to the law; and thereupon, in the absence of further statutory conditions, corporate life begins.

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by the act of parliament, or of the king, or of the pope. * * * Dean and chapter, mayor and commonality are incorporated by the king; the mendicant friars by the pope; abbot and convent by both king and pope." I Pollock & Maitland History of English Law, 473. For the English Company law before and after the "Bubble Act," see II Lindley Partnership, ch. 5; Ency. Brit. (11th ed.) Vol. 6, 795.

§ 20. **History of the Maryland general law.** The legislation of Maryland is sufficiently typical to give an idea of the subject generally. Prior to the year 1838, the Vestry Act (1798, ch. 24) and the Religious Corporations Act (1802, ch. 11), were the only steps taken in the direction of free incorporation. By the Act of 1838, ch. 264, persons desirous of obtaining charters for manufacturing purposes were permitted to incorporate under a general law. Between 1838 and 1868, new purposes for which incorporation might be obtained were added until, at the latter date, the general incorporation law provided for associations of the following descriptions: Associations "for any moral, scientific, literary, dramatic, agricultural or charitable purpose or for the purpose of forming any uniformed volunteer company, fire engine or hose company, land company, or beneficial, benevolent or musical society; cemetery companies; building associations; manufacturing companies; mining companies; religious societies; telegraph companies; companies for 'obtaining oil by boring or otherwise'; universities and colleges."

With the year 1868, a new order began. The Constitution of 1851 had provided that "corporations may be formed under general laws but shall not be created by special acts except for municipal purposes and in cases where, in the judgment of the General Assembly, the object of the corporation cannot be obtained under the general laws." This provision was repeated in the Constitution of 1864; but in that of 1867 (Art. III, sec. 48), which is now in force, the language was changed to the following: "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes and except in cases where no general laws exist providing for the creation

of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this section shall be void;—provided, nothing herein shall be construed to extend to banks or the incorporation thereof."

It was further provided that as soon as practicable after the adoption of the Constitution, the governor should appoint three persons learned in the law to prepare drafts of general laws "providing for the creation of corporations in such cases as may be proper and for all other cases where a general law can be made." The report of the commissioners became the Act of 1868, ch. 471, and was the foundation of Article 23 of the Code as it stood until the passage of the Act of 1908, ch. 240,—revising the general corporation law of the State. By successive amendments between 1868 and 1908, the list of purposes was enlarged; and by the Act last named it was provided that "corporations may be formed under the provisions of this article for any one or more lawful purposes, except such as are excluded from the operation of the general law by the Constitution of this State."

§ 21. **Scope of the general law.** The plain intent of the Constitution was to reserve municipal and possibly banking corporations for special charters, and to dispense with the latter in "all other cases where a general law can be made." But this intent was not realized. In the first place, the legislatures succeeding that of 1868 did not, in broadening the scope of the general law, keep step with the need; and in the second place, the Court of Appeals decided that the grant of special powers to a corporation of a class covered by the general law, makes a special charter valid.[1] The

[1] *Reed v. Trust Company*, 72 Md. 531.

Act of 1908, in addition to permitting incorporation for any lawful purpose, annexes the right to obtain all proper powers. Accordingly, the necessity for a legislative or special charter can rarely exist; and one unnecessarily granted is void. The test of necessity is whether the results of the special act are obtainable under the general law.[1]

§ 22. **Analysis of the Maryland general law.** Article 23 (Corporations), as now contained in the Code of 1911, consists of some 468 sections; and these comprise the relevant statutory law except: (a) Article 11 (Banks and Trust Companies); (b) Article 81 (Revenue and Taxes), which includes most but not all of the law relating to corporate taxation; (c) Article 7 (Labor Disputes); and (d) scattered provisions,[2] such as those to be found in Article 16 (Chancery), Article 21 (Conveyancing), Article 27 (Crimes and Punishments), and Article 33 (Elections).

A large part of Article 23 is taken up by the Uniform Stock Transfer Act and the Public Service Commission

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[1] The Act of 1908 does not supersede provisions elsewhere in the law for particular classes of corporations. If the provisions made for such particular classes contain limitations which the incorporators desire to escape (e. g. secs. 293 and 382 of Code 1911, art. 23) a special act will be necessary. Again, a special charter containing provisions inconsistent with those of the general law (e. g. requiring more than a majority of the stock to constitute a quorum) would probably be upheld under *Reed v. Trust Co.*, 72 Md. 531. A question at least debatable relates to the case of State banks. Ch. 219 of the Acts of 1910 (now Code 1911, art. 11) is a general law for the incorporation of banks and trust companies. The question is: Whether the intent of the Constitution (*supra*, §20) was to prohibit the formation of banking corporations otherwise than by special act.

[2] For which see Williams: Corporation Law of Maryland,—a useful compilation.

Act,—both passed in 1910. The remaining sections may, with substantial accuracy, be grouped as follows: (1) Those relating specifically to corporations formable under the general law but belonging to particular classes, e. g. railroads, insurance companies, and about a dozen others; and (2) the sections representing for the most part the revision of 1908, and which govern in the absence of special provisions. The point for emphasis is, that in considering questions of formation, powers and limitations, the first inquiry must be whether the corporation belongs to one of the particular classes for which special provision has been made.[1]

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[1] The Act of 1908 (Code 1911, art. 23, sec. 1) declares that its provisions shall apply to and govern all corporations of the State; "provided (first) that nothing in said sections contained shall be construed to affect the existence of any existing corporation or to impair the validity of any corporate act done and performed in accordance with the pre-existing law; and provided (second) that in the event of any inconsistency between any of the provisions of said sections and the rights conferred by any special act or any legally authorized agreement of consolidation passed, or filed, prior to the first day of June, in the year nineteen hundred and eight (1908), the provisions of said special act or agreement of consolidation shall prevail to the extent of such inconsistency; and provided (third) that in the event of any inconsistency between any of the provisions of said sections and the provisions made for particular classes of corporations by the subsequent sections of this article, the latter shall prevail to the extent of such inconsistency; and provided (finally) that unless therein otherwise stated, the said sections shall be available to all corporations of this State as alternative to and not in substitution for any inconsistent provisions contained in any such special act or agreement of consolidation or in the provisions made for particular classes of corporations by the subsequent sections of this article."

§ 23. **Procedure under the Maryland general law.** Bearing in mind that variations may exist if the proposed corporation belongs to a class for which special provision is made,[1] the procedure leading up to incorporation is prescribed by the Act of 1908 (Code 1911, Art. 23, secs. 3, 4 and 5) as follows:

The incorporators must be three or more adult persons. They need not be subscribers to the company's stock and their citizenship is a matter of indifference, except that one at least must belong to this State. They execute a certificate setting forth: (a) Their purpose to associate with the intention of forming a corporation; (b) the name of the proposed corporation, which must be such as to distinguish it from a natural person or a partnership: and this latter provision will be complied with if the name begins with "the" and ends with "company" or "corporation," or if the title contains the word "incorporated"; (c) the proposed purpose and business; (d) the place in this State of the principal office; (e) "the total amount of capital stock, if any, and the number and par value of the shares: and the restrictions, if any, imposed upon the transfer of the shares: and if the capital stock is to be classified under the power hereinafter granted, the certificate shall state how much of said stock is to be preferred and the preferences, voting powers, restrictions and qualifications of the preferred stock"; (f) "the number of trustees, directors or managers, which shall not be less than three: and the names of those who shall act as such for the first year or until their successors are duly chosen and qualified"; (g) "any provision which may be desired for the purpose of defining, limiting and regulating

[1] E. g. a religious corporation formed under the Act of 1802 (Code 1911, art. 23, secs. 339, &c.) See *Boyce v. Trustees*, 46 Md. 369; *Baltzell v. Church Home*, 110 Md. 262.

the powers of the corporation, and of the directors and stockholders or any class of the stockholders; provided, such provisions are not contrary to the law of this State or inconsistent with any of the terms and limitations of this article." This certificate must be acknowledged before some officer competent to take acknowledgment of deeds conveying lands in this State; and it is then submitted to one of the judges of the judicial circuit in which the principal office is to be located,—who certifies thereon its conformity with the law.[1] The certificate, when so certified, is delivered to the State Tax Commissioner, who records the same and transmits either the original, or a copy duly certified, to the clerk of the Circuit Court or of the Superior Court of Baltimore City (according to the location of the principal office) to be again recorded. And by sec. 5 it is provided: "When such certificate has been executed and acknowledged in due form and delivered to the State Tax Commissioner with the recording fees and the bonus tax, if any payable, the incorporators, their associates and successors shall, according to the purposes, conditions and provisions in the certificate contained, become and be a body corporate by the name therein stated. And a duly certified copy of such certificate from the records of the State Tax Commissioner or of the clerk of the Circuit or Superior Court shall be *prima facie* evidence of the existence of the corporation and its right to exercise the powers therein mentioned."[2]

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[1] The certificate of the judge is not conclusive. *Hyattsville v. Washington &c. R. Co.*, 120 Md. 137.

[2] "Certificate of Incorporation" and "Articles of Incorporation" are interchangeable terms,—both being used in contrast with "Charter," which indicates creation by special act.

Under the pre-existing law (Code 1904, art. 23, sec. 14), there

§ 24. **Amendment of charter or certificate.** Some important structural changes that formerly required an amendment may, since the Act of 1908, be accomplished by the adoption or alteration of a by-law.[1] And the provisions for amending any charter or certificate are now so broad as to eliminate practically any necessity for resorting to the legislature for such purpose.[2] Nevertheless, it seems that

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was a fixed limit (not less than four nor more than twelve) to the number of directors; all had to be citizens of the United States and a majority citizens of this State. The former law, with a few exceptions, limited the existence of the corporation to forty years. The present provisions (sec. 100) is: "Every corporation formed under this article shall have, until forfeiture, the right of perpetual succession; and all provisions in the charter or certificate of any existing corporation imposed upon it by any act in force at the time of its creation or formation, limiting its duration, are hereby annulled and repealed." In the Act of 1910 (Code 1911, art 11, sec. 21), which provides for the incorporation of banks and trust companies, there is a needless reproduction of the old limitation. It is there provided that the certificate of incorporation shall contain, among other statements, "the period for which such bank is organized, not exceeding forty years"; and as to trust companies (sec. 42), "the term of its existence, not exceeding forty years."

[1] E. g. changing the number and classification of directors (Code 1911, art. 23, sec. 12): providing for cumulative voting (*ibid*, sec. 20).

[2] Code 1911, art. 23, sec. 24, provides: "Every corporation of this State now existing or hereafter formed may, from time to time, at any meeting duly warned as provided for by sections 15 or 16 of this article, by the affirmative vote of a majority of all its members or a majority of all its stock (or if two or more classes of stock have been issued of a majority of each class) outstanding and entitled to vote, amend its charter or certificate of incorporation, and thereby accomplish any one or more of the following objects: The addition to or diminution of the corporate powers and purposes, or the substitution of other powers and purposes in whole

a special act embodying the same amendment that could have been effected under the provisions of the general law, would not be void.[1]

§ 25. **Federal corporations.** The Constitution nowhere expressly confers upon Congress the power to create corporations, but such power may be lawfully exercised in aid of the expressed powers. For example, to facilitate the carrying on of the government's fiscal operations, Congress

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or in part for those prescribed by any charter or certificate; provided that such additional or substituted powers are such as are authorized by this article; the changing of the corporate name; the changing of the corporate business; the increasing or decreasing of the capital stock and the classification of any increase; the reduction of the number of outstanding shares; the classification of any unissued part of the authorized capital stock; and the changing of the location of the principal office." And sec. 25 provides: "Articles of amendment signed and acknowledged in the same manner as an original certificate. by the president and a majority of the directors, managers or trustees shall within thirty days after such meeting be prepared, setting forth such amendment and the particulars thereof and stating that it has been duly adopted by the stockholders or members; but no amendment shall take effect until the articles have been duly executed and delivered to the State Tax Commissioner with the recording fees (to be charged at the same rates, and by said Commissioner divided, accounted for, and paid over, as in the case of an original certificate). Articles of amendment shall be promptly recorded by the State Tax Commissioner, and when recorded the original or a certified copy shall be sent by him for recording to the clerk of the circuit or superior court as is hereinabove provided for the case of an original certificate; and a duly certified copy of such articles of amendment from the records of the State Tax Commissioner or of the Circuit or Superior Court shall be *prima facie* evidence of the rights and powers of the corporation as amended."

[1] *Hodges v. Railway Co.*, 58 Md. 620; and see *Jones v. Habersham*, 107 U. S. 174; *Wallace v. Loomis*, 97 U. S. 146.

may charter banks;[1] and under its power to regulate commerce and to establish post offices and post roads, it may charter interstate railroads. Furthermore, acting as the legislature of the District of Columbia, Congress has made general provisions for the formation of corporations therein. All of these are corporations of the United States and may, where the jurisdictional amount is involved, sue and be sued in the federal courts and remove there suits brought against them in the state courts, on the ground that such suits arise under the laws of the United States.[2] Those Federal corporations which are in fact governmental agencies may exercise the right of eminent domain within the states, and the latter can neither exclude them nor by taxation impair their franchises.[3]

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[1] *McCulloch v. Maryland,* 4 Wheat. 316; *Osborn v. U. S. Bank,* 9 Wheat. 738.

[2] *Railroad Co. v. Myers,* 115 U. S. 1; *Knights of Pythias v. Kalinski,* 163 U. S. 289; *Supreme Lodge v. Hill,* 76 Fed. 469; *Railroad Co. v. Cody,* 166 U. S. 606; *Railroad Co. v. Coeur d'Alene Co.,* 160 U. S. 93. By the terms of the national banking act, a different rule applies to national banks.

[3] *Luxton v. North River Bridge Co.,* 153 U. S. 525; *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 U. S. 1; *City of Richmond v. Southern Bell Telephone Co.,* 174 U. S. 761. State taxation of shares in national banks is permitted by the Act of Congress.

CHAPTER IV.

WHEN CORPORATE LIFE BEGINS.

§ 26. **Scope of the chapter.** Corporate status does not rest upon agreement merely; and it is important, therefore, to understand the antecedent conditions upon which the status depends: and the rights and liabilities of the parties where there have been dealings with an apparent but not a real corporation. The subject has developed a mass of irreconcilable decisions.

§ 27. **Conditions precedent in Maryland law.** The attempt to acquire corporate status may fail because of the failure to comply with requirements which the law declares to be precedent to corporate existence.

First. A special charter is merely an offer by the state to the incorporators; and unless and until this offer is accepted there is no corporation. Moreover, such acceptance to be valid must be the act of a majority of the incorporators, done within the limits of the creating state (*Smith v. Silver Valley Mining Co.*, 64 Md. 93);[1] and the acceptance must be consistent with the terms of the offer (*Lyons v. Railroad Co.*, 32 Md. 30). In the case of corporations formed under general law, acceptance is conclusively pre-

[1] See, however, *Handley v. Stutz*, 139 U. S. 417.

sumed (*Glymont Co. v. Toler*, 80 Md. 278). And even in the case of special charters it may be inferred from the exercise of corporate powers (*Lyons v. Railroad Co.*, 32 Md. 30; *Hammond v. Straus*, 53 Md. 12; *Jackson v. Walsh*, 75 Md. 315; *Regents v. Williams*, 9 G. & J. 235); but where there is direct proof of a refusal or neglect to accept, no such inference can be drawn (*Smith v. Silver Valley Mining Co., supra*).

Second. Accepting the charter, formally or by user, is not enough. All things which, by fair construction, the incorporators are to do before and as a foundation of the right to act corporately, are conditions precedent to corporate existence. In practice, there is difficulty in determining whether a particular condition is precedent or subsequent; but where the premise is granted the conclusion is inevitable. "Whenever any act is essentially necessary to be done before a corporation can be regarded as *in esse*, that must be established or the corporation cannot be held to be a legal entity" (*Bonaparte v. Railroad Co.*, 75 Md. 350).

Third. If the corporation is formed under the general law, there must be a substantial compliance with the formalities of that law. "The statute law of the State expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly or upon the principle of estoppel to create a corporation, would be in manifest opposition to the statute law, clearly against its policy and justified upon no sound principle in the administration of justice" (*Boyce v. Trustees*, 46 Md. 374[1]). But merely formal defects are harmless (Code 1911, Art. 23.

[1] Doctrine affirmed: *Maryland Tube Works v. West End Improvement Co.*, 87 Md. 208; *Shutter Bar Co. v. Zimmerman*, 110 Md. 317.

sec. 6); and every defect, formal or vital, will be cured if the legislature recognizes the pretended corporation as one validly existing. (*Basshor v. Dressel*, 34 Md. 510; *Koch v. Railroad Co.*, 75 Md. 226; *Munich Co. v. Surety Co.*, 113 Md. 225).[1]

Fourth. Sometimes a statutory requirement in terms merely suspends corporate activity. For example, a Maryland taxing statute provides that certain classes of corporations, whether created by special charter or formed under a general law, shall pay to the State upon incorporation a bonus of one-eighth of one per cent. upon the amount of the authorized capital stock; and it is declared that until such bonus has been paid to the State Treasurer, the corporation shall not "have or exercise any corporate powers." In *Maryland Tube Works v. West End Improvement Co.*, 87 Md. 208, it was held that the provision forbidding the having or exercising of any corporate powers, "included generally suits by or against the corporation," and that, having failed to pay the tax, the appellant's right to sue was as effectively denied as if there had been a judgment forfeiting its charter prior to the suit.[2]

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[1] The principle, in these and similar cases, is broadly stated; and the result seems to be that, by recognition, the legislature can give life to a corporation which, by the Constitution, it could not originally have created. See I Thompson Corporations, sec. 512.

[2] There is in the law (Code 1911, art. 81, sec. 101) a provision that the State may sue the corporation in default, and if the judgment in such suit shall not be paid within two years, the charter shall be "decreed to be forfeited and annulled *ipso facto*." For most purposes, it is immaterial whether the result of failure to pay the bonus tax is non-existence or merely suspended animation. See *Cleaveland v. Mullin*, 96 Md. 598; *State v. Consolidated Gas Co.*, 104 Md. 368; *Shutter Bar Co. v. Zimmerman*, 110 Md. 317. A subscription made before but ratified after payment of the tax, is binding. *Murphy v. Wheatley*, 102 Md. 501.

§ 28. **Conditions subsequent.** The charter or the general law may prescribe acts to be done after corporate birth. Non-performance gives to the state the right to take proceedings for forfeiture of the charter; but does not otherwise affect corporate existence. As in the case of precedent conditions, the difficulty is not so much in the rule as in its application; and sometimes the distinction between causes of prevention and causes of forfeiture is finely drawn. In *Hammond v. Straus,* 53 Md. 14, a charter provided that when a certain percentage of the share capital had been paid in, the payment certified to the State Treasurer and a certificate of organization transmitted, "and not before, the incorporators shall be entitled to all the benefits and privileges herein conveyed or intended to be conveyed." The court held that this language did not import a condition precedent.[1] Conditions subsequent may, however, by the express terms of a statute, be made self-executing and of their own force terminate corporate existence in cases of non-performance.[2]

§ 29. **No such corporation.** If logic instead of experi-

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[1] And see the learned opinion in *Munich Co. v. Surety Co.,* 113 Md. 222,—distinguishing *Franklin Insurance Co. v. Hart,* 31 Md. 59. Also, *Wells v. Gastonia Co.,* 198 U. S. 177.

[2] *Maryland Tube Works v. West End Improvement Co.,* 87 Md. 216, quoting with approval 5 Thompson Corporations, sec. 6587; *Nicolai v. Maryland Agric. Asso.,* 96 Md. 324.

Code 1911, Art. 23, secs. 120-122, provides for organization and payment of the bonus tax within two years from the date of charter granted; otherwise, the dormant corporation "shall be conclusively presumed to have surrendered all corporate or charter rights." Art. 81, sec. 99, provides that certain defaults on the part of a corporation "shall be deemed to amount to and shall constitute a forfeiture of the charter." The former provision was, *inter alia,* discussed in *Murphy v. Wheatley,* 102 Md. 501, and held not to be self-executing.

ence were the life of the law, *nul tiel corporation,* as the old phrase went, would be a good defense to every claim by, against or under a pretended corporation. Because corporate personality is a state concession, a group can never become a body corporate simply by pretending to be such. A special charter is merely a proposal until its terms are accepted; a general incorporation law is a standing offer to those who comply with its provisions, and in no other way than by acceptance and compliance can a corporate person be brought to the birth. But suppose that titles are taken and conveyed; that contracts are made and liabilities incurred in the name of a supposed corporation,—what are the rights and liabilities of the parties? No concise answer can be given to this question because the law on the subject is a part of chaos. It is always the right of the state to inquire by what warrant a corporation presumes to exist; but whether and when the question may be raised by private litigants,—decisions differ.

There are three principal views: (1) That corporate existence is always open to inquiry and may be denied by the pretended corporation or by any person interested in denying it. (2) That where you have (a) a special or a general law under which the pretended corporation might have been formed; (b) an attempt in good faith to organize thereunder; and (c) an actual user of the corporate franchise,—then you have a corporation *de facto,* and until the state questions its existence, no one may.[1] But in this view there can be no corporation *de facto,* where there could be

[1] The weight of authority favors the *de facto* rule, except where it is sought to be applied to conditions not within its intent and purpose,—such, for example, as cases of eminent domain and stock subscriptions. See, for a good discussion of the conflicting opinions on the subject generally, Harvard Law Review, xxv, 623.

none *de jure* (*Tulare District v. Shepard,* 185 U. S. 14). (3) That where parties have undertaken to deal as with a corporation, both it and they, in any proceeding growing out of such dealing, are estopped to deny its existence.

The distinction between the second and third views is sometimes confused. Where *de facto* corporations are recognized and the three requisites concur, you have an entity that is a corporation *de jure* against all persons but the state. On the other hand, the estoppel doctrine is applied only to the facts of each particular case and may be invoked even where there is no corporation *de facto*. For example, one who has given credit to what both parties supposed to be a corporation, would not be allowed to sue the stockholders as partners,—even if one or more of the requisites of a *de facto* corporation were absent.[1]

§ 30. **The Maryland law.** The first view, namely, that "the legal existence of a corporation is always open to inquiry" may be said to have been the rule in this State prior to the legislation of 1908,—presently discussed. The *de facto* doctrine has been explicitly rejected as opposed to public policy and the application of estoppel has been denied;[2] but there are, nevertheless, cases in which, sometimes

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[1] This confusion of ideas appears in *Jones v. Aspen Hardware Co.,* 21 Col. 263, cited in 87 Md. 217 and 110 Md. 318. See comment in I Wilgus Corporations, 629 and 671. Where the *de facto* theory exists, there is no need for invoking an estoppel.

[2] *Boyce v. Church,* 46 Md. 369, where the estoppel rule would have prevented an unjust result; *Smith v. Silver Valley Mining Company,* 64 Md. 94,—with which compare *Cannon v. Brush Electric Company,* 96 Md. 446; *Bonaparte v. Railroad Company,* 75 Md. 340; *Maryland Tube Works v. Improvement Company,* 87 Md. 215; *Cleaveland v. Mullin,* 96 Md. 605. Compare *Isaac v. Emory,* 64 Md. 333 and *Jones v. Linden Building Asso.,* 79 Md. 73.

upon grounds involving estoppel and sometimes upon the ground of collateral attack, inquiry into corporate existence has been excluded.[1]

§ 31. **Act of 1908 (Code 1911, Art. 23, sec. 6).** This provides that: "No certificate of incorporation shall be declared void for formal defects merely; and where an effort has been made in good faith to form, under the laws of this State, a corporation formable thereunder, neither party to any transaction with it shall deny the legality of its incorporation or organization in any suit or proceeding growing out of such transaction; and 'transaction' shall include any wrong to person or property giving rise to a cause of action or equitable relief by or against such corporation." The purpose of this provision was to prevent attack on corporate existence for formal defects in any case; and for any defects in two cases: (a) Where the defendant, pleading its own or the plaintiff's non-existence, has dealt on a corporate basis in the transaction out of which the suit arises; and (b) where, in the absence of any such dealing, the defendant so setting up its own or the plaintiff's defective incorporation, is sued as a wrongdoer. Cases in which there has been no dealing on a corporate basis, and in which the pretended corporation is asserting rights dependent upon valid

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[1] *Maltby v. Railroad Company*, 16 Md. 422; *Franz v. Building Association*, 24 Md. 259; *Laflin v. Sinsheimer*, 46 Md. 315; *Keene v. Van Ruth*, 48 Md. 184; *Pott v. Schmucker*, 84 Md. 551. In *Maryland Tube Works v. Improvement Company*, 87 Md. 215, it is said of some of these cases that they dealt with "legally existing bodies capable of acting." For a true and a mistaken conception of collateral attack, compare *Lord v. Essex Building Asso.*, 37 Md. 320, with *Keene v. Van Ruth, supra.*

incorporation,[1]—were left untouched by the law, which is moreover limited in such a way as to prevent its application to what may be called corporations by usurpation. The law came before the Court in *Shutter Bar Company v. Zimmerman,* 110 Md. 314,—where the question was: "Whether a corporation, which did not pay its bonus tax until after the publication of an alleged libellous circular letter, can recover damages in an action on the case against the publisher of the letter, for libel." Discussing the Act of 1908, it is said: "The obvious purpose and spirit is to save the incorporation of persons who have in good faith made an effort to comply with the requisites of the corporation laws of the State but whose compliance turns out to have been in some respects irregular or informal. It was not intended to cover cases where through indifference or neglect there has been no attempt at all to comply with important requirements of the law which by its express terms are made conditions precedent to the possession or use of any corporate franchises. * * * It has been held by our predecessors that a corporation cannot be actually or virtually created by estoppel in Maryland. In *Boyce v. Trustees M. E. Church,* 46 Md. 373, it is said: 'The statute law of the State expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties, indirectly or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy,

[1] E. g. eminent domain; and see *Bonaparte v. Railroad Co.,* 75 Md. 340. A subscriber to stock would naturally have the right to insist upon technical incorporation.

and justified upon no sound principle in the administration of justice.' "[1]

§ 32. **Estoppel by pleading.** In common law pleading, the general issue puts upon a corporation plaintiff the burden of proving its legal existence; and this was the settled law in Maryland (*Agnew v. Bank,* 2 H. & G. 493). But by statute (Code 1911, Art. 75, sec. 24, sub-sec. 108) it is now provided that "whenever the partnership of any parties or

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[1] But while the result in this case was right, it is submitted that the construction of the new law is unnecessarily narrow; and that there is a broad difference between creating a corporation by estoppel and estopping a litigant in a particular case from setting up the claim of no such corporation. If such estoppel can arise from a failure to plead (see § 32), there should be no difficulty in applying an estoppel by conduct. Failure to pay the bonus tax, while evidence of someone's indifference and neglect, is not the same thing as lack of good faith. Moreover, to make the consequences of such failure fall upon innocent stockholders or ignorant creditors, seems disproportioned to the good accomplished by the rule, especially as ample means for the prompt collection of the bonus tax are given to the State officials. A charter, as in *Franklin Insurance Co. v. Hart,* 31 Md. 59, may make the subscription to a given amount of stock a condition precedent to corporate existence. Such corporation may incur liabilities before the condition has been complied with; the logical result of the strict doctrine is, that these will not be valid as corporate obligations; and in some jurisdictions the stockholders may be held as partners. Inasmuch as an unincorporated association, having the statutory right to sue and be sued in the group name, was recognized as a legal unit in *Snowden v. Crown Cork & Seal Co.,* 114 Md. 650, there would seem to be nothing in the public policy of the State opposed to either the *de facto* or the estoppel doctrines. For the Federal decisions, see *Andes v. Ely,* 158 U. S. 312 and cases cited; also *New Orleans Debenture Co. v. Louisiana,* 180 U. S. 328. And for illustrations of difficulties arising from the application of the strict doctrine, see *Isaac v. Emory,* 64 Md. 333; *Jones v. Linden Building Asso.,* 79 Md. 73.

the incorporation of any alleged corporation, or the execution of any written instrument filed in the case is alleged in the pleadings in any action or matter at law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties."[1]

§ 33. **Partnership liability.** Where the doctrine of corporations *de facto* and the estoppel theory are not recognized, parties who undertake to carry on business in the name of a pretended corporation may be liable as individuals to those with whom they deal. There are two views of this liability: (1) That all the associates, particularly if the association is one for gain, are partners and bound as such; (2) that liability depends upon agency and only those who participate in the particular transaction are liable,—they being held under the rule that one who acts as agent without authority or without a principal, is personally responsible to those with whom he deals. This appears to be the

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[1] *Black v. First National Bank,* 96 Md. 399; *Railroad Co. v. Hoover,* 79 Md. 267; *Banks v. McCosker,* 82 Md. 526. The wording of the Practice Act for Baltimore City (Baltimore City Code 1906, sec. 312) is different: "If the copartnership or incorporation of any of the parties to the suit shall be alleged in the declaration and the affidavit to be filed therewith * * * the fact of such alleged copartnership or corporation shall be deemed to be admitted for the purposes of such cause unless the said affidavit shall further state that the affiant knows or has good reason to believe such allegations * * * to be untrue." This provision is limited to the parties to the suit. In *Horner v. Plumley,* 97 Md. 282, it was held (on a different point) that the local Act is "complete in itself and exclusive" of the State law; but in that case there was no conflict between the two.

sounder view.[1] As among themselves, the rights of shareholders in a pretended corporation are what they would be if it had been duly incorporated;[2] and transactions before, can be ratified after *de jure* incorporation.[3]

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[1] See Thompson Corporations, secs. 269 and 8520; Machen Corporations, sec. 293; Harvard Law Review, xxv, 633. See, also, *Hart v. Insurance Co.*, 31 Md. 65 and *Register v. Medcalf*, 71 Md. 528. The discussion illustrates the merits of the estoppel doctrine. Where parties have contracted, in good faith, for and with a supposed corporation, the rule imposing personal liability always violates the intention of the parties and usually works injustice.

[2] *Cannon v. Brush Electric Co.*, 96 Md. 446.

[3] *Grape Sugar Co. v. Small*, 40 Md. 395; *Murphy v. Wheatley*, 102 Md. 502; *Munich Co. v. Surety Co.*, 113 Md. 225.

PART III.

WHAT A CORPORATION MAY DO.

CHAPTER V.

GENERAL POWERS AND DISABILITIES.

§ 34. **Corporate capacity.** After you have made certain of its existence, the next question is whether the corporation may lawfully do a particular act contemplated or actually done. And herein lies the fundamental difference, in the prevailing modern theory, between an artificial and a natural person. To the latter, everything not forbidden is permitted. The powers of the former are limited by the grant, and anything not given explicitly or implicitly is withheld. A corporation is created for the certain purposes specified in its charter or articles of association; its lawful transactions are those fairly in furtherance of such purposes; the powers it may exercise in these transactions are only those the law has conferred upon it; and these powers must be exercised in the appointed way. Where, then, do you find the rule by which the powers of the artificial person and those of the natural person are distinguished? The starting point is in the common law doctrine, which knew nothing of the modern limitations and which ascribed to a corporation general capacity, limited only by the necessities of incorporeality. Then come modifications of the common law doctrine, whether in judicial decision or enacted law, whereby some of the earlier disabilities are removed and new limitations are introduced,—notably that which confines corporate action within the scope of the charter.

§ 35. **Common law powers and disabilities.** The old cases enumerated the attributes of a corporation as follows: To have a common name, a common seal and perpetual succession; to contract, sue and be sued; to hold and dispose of property; and to make by-laws for the government of the members and the regulation of corporate affairs. To the modern lawyer, the importance of the early view lies in the disability consequent upon the incorporeal nature of the artificial person. A corporation could not take an estate in joint-tenancy, because there was no survivorship;[1] it could not be an executor because this required the taking of an oath; it could not execute a power or act as trustee or agent, if the duty to be performed could only be accomplished by delegation of the authority conferred;[2] it could not amend its charter, or make any organic change in its structure, or terminate its existence by a voluntary winding up, because these things were incompatible with its nature. The prevailing rule is that these disabilities remain, unless removed by statute or special charter.

§ 36. **Modifications of the common law doctrine.** Subject to the limitations of incorporeality, it is probably true that at common law, a corporation could exercise all the powers of a natural person and engage in any transaction

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[1] Grant Corp., 109; 5 Thompson Corp., 5793.

[2] *George Town College v. Brown,* 34 Md. 453; *Frostburg Building Asso. v. Lowdermilk,* 50 Md. 179. In the latter case it was said: "It is impossible in the nature of things that a corporation can execute such a power, except through its attorney or agent, and in that event the authority would be derivative, not original." See further, *Chilton v. Brooks,* 71 Md. 449; *Reed v. Baltimore T. Co.,* 72 Md. 534. For the subject generally and the conflicting views, see 5 Thompson Corp., 5833-5835; *Vidal v. Girard's Exrs.,* 43 U. S. 125; *Barnum v. Baltimore,* 62 Md. 293.

not expressly forbidden to it.[1] But now the accepted rule makes the charter, read in the light of any relevant statute, the measure of corporate powers. "A corporation is a creature of the law and derives all its powers from the act of incorporation. It is exactly what that act has made it and is incapable of exerting any other faculties than those conferred by that act or in any other manner than it authorizes."[2]

Subject, then, to this cardinal limitation, what other modifications of the common law doctrine have been introduced by legislation and judicial decision? It is obvious that a concise treatment must deal with the subject in broad outlines. Within constitutional limits, a special charter may modify common law disabilities to any extent; a general incorporation law may and usually does define the powers and limitations of the associations formable under it;[3] and

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[1] Compare the opinion of Blackburn, J. in *Riche v. The Ashbury Company,* L. R. 9 Exch. 224 with the overruling decision of the House of Lords, L. R. 7 H. L. 653. The distinction herein between the corporation and the statutory company is historically sound, but does not exist in American law.

[2] *Baltimore v. Railroad Co.,* 21 Md. 50. But there is a difference, in consequences, between want of power and the irregular exercise of a granted power. See *post,* §79.

[3] E. g. Code (1911) Art. 23, sec. 7: "Every corporation which is subject to the provisions of this article shall have the following general powers, except where the special provisions relating to any particular classes of corporations are inconsistent herewith:

(1) To have perpetual succession by its corporate name.

(2) To sue and be sued, complain and defend in all courts.

(3) To make and use a common seal and alter the same at pleasure.

(4) To transact its business, carry on its operations within or without this State, and to exercise in any other State, territory, district or possession of the United States, or in any foreign country,

special provisions may be made for particular kinds of associations. The following illustrations will give a view of the subject which is incomplete but not, it is hoped, inaccurate. It will appear: first, that sometimes the denial of a power is merely a decision that a particular transaction is foreign to the scope of the charter; second, that there are restrictions imposed upon public-service corporations which are not applicable to purely private bodies; third, that some statutory provisions deal with merely administrative powers

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so far as the laws thereof permit, the powers granted by this article.

(5) To make contracts, incur liabilities, and borrow money; and to issue bonds and secure the same by mortgage or deed of trust of its property, franchises and income; provided such issue is authorized at any meeting duly warned, as provided for in secs. 15 and 16 of this Article, by the affirmative vote of a majority of all its members or a majority of all its stock (or if two or more classes of stock have been issued, of a majority of each class) outstanding and entitled to vote.

(6) Subject to the provisions of Art. 38 of the Declaration of Rights, to acquire by purchase or in any other manner, and to take, receive, hold, use and employ, sell, mortgage, lease, dispose of and otherwise deal with any property, real or personal, including the shares, bonds and securities of other corporations, situated in or out of this State, which may be appropriate to enable it to carry on the operations or fulfil the purposes named in the certificate of incorporation.

(7) To have such officers and agents as the business of the corporation may require.

(8) To make by-laws not inconsistent with law for regulating the government of the corporation and for the administration of its affairs.

(9) Generally to exercise the powers set forth in the certificate of incorporation and those herein enumerated and also to do every other act or thing not inconsistent with law which may be appropriate to promote and attain the objects and purposes for which the corporation was formed."

while others confer upon the corporation the right to make organic or structural changes; and fourth, that in all cases, the phraseology of particular statutes is a matter of vital importance.

§ 37. **Geographical limitations.** It is a prevailing rule of American law that a corporation has no legal existence, and can, therefore, exercise no constituent powers, outside of the boundaries of the state by which it was created. This means that all acts of the corporation at large, as distinguished from those which may be done by agents, must be transacted within the creating state.[1] It may have agents, maintain an office and do business outside of its domicil; and a meeting of directors may be so held,—since they are merely agents of the corporation. But the rule draws a shadowy distinction between the invisible entity and the natural persons who represent it; and in the absence of statutory permission, "it must dwell in its place of creation and cannot migrate to another sovereignty."[2] An important consequence of this principle is that no state is bound to recognize the corporations of another; and, except in the case of federal agencies and those engaged in interstate commerce, "States may exclude a foreign corporation or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."[3]

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[1] *Smith v. Silver Valley Mining Co.*, 64 Md. 91. Compare, however, *Handley v. Stutz*, 139 U. S. 417.

[2] *Bank of Augusta v. Earle*, 13 Pet. 519.

[3] *Paul v. Virginia*, 8 Wall. 168. But silence is equivalent to consent. *Insurance Co. v. Langley*, 62 Md. 196. And a corporation having duly entered may acquire rights against the state. *Southern Railway Co. v. Greene*, 216 U. S. 400; *Western Union Co. v. Kansas*,

§ 38. **Holding and disposing of property.** Except for the statutes of mortmain, there was no restriction in the common law on the right of a corporation to acquire property. The modern limitations are substantially these: 1st. Constitutional or statutory provisions sometimes forbid religious bodies to acquire property without legislative consent. 2nd. In the charter or general law there may be found limitations upon the amount of property which a corporation may hold. 3rd. The right, particularly of a foreign corporation, to hold real estate may be conditioned upon compliance with the requirements of some statute. 4th. The acquisition of property must not be for a purpose foreign to the scope of the charter. 5th. In the case of a public-service corporation, the policy of the law forbids any alienation of property that would result in impairing its ability to perform the duty owed to the public. 6th. Based, sometimes upon public policy and sometimes upon statute, there are limitations, more or less shifting, upon the right of a corporation to acquire its own shares and the shares of other corporations. These matters will be considered in their order.

First. In Maryland, the Declaration of Rights, Art. 38, provides that "Every gift, sale or devise of land to any Minister, Public Teacher or Preacher of the Gospel, as such, or to any Religious Sect, Order or Denomination, or to or for the support, use or benefit of or in trust for, any Minister, Public Teacher or Preacher of the Gospel, as such, or any Religious Sect, Order or Denomination; and every

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216 U. S. 1. In English law, a foreign corporation may be served and sued wherever it does business; and by doing business becomes, at least as to such business, a resident. *La Bourgoyne* (1899) A. C. 431.

gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor to or for such support, use or benefit; and also every devise of goods or chattels to or for the support, use or benefit of any Minister, Public Teacher or Preacher of the Gospel, as such, or any Religious Sect, Order or Denomination, without the prior or subsequent sanction of the Legislature shall be void; except always any sale, gift, lease or devise of any quantity of land not exceeding five acres, for a church, meeting house or other house of worship or parsonage or for a burying ground, which shall be improved, enjoyed or used only for such purpose; or such sale, gift, lease or devise shall be void."[1]

While these provisions are not directed against corporations as such, their application involves some questions of corporation law. The following results have been established. 1st. The prohibition has no application to non-resident corporations unless the subject matter is real estate situated in Maryland. *Vansant's Case,* 3 Md. 119. And a gift to a foreign corporation of the proceeds of land in Maryland devised to executors to be sold, does not require legislative assent. *Church Extension Society v. Smith,* 56 Md. 365. Nor is the prohibition applicable to a charitable corporation whose officers must, under its charter, be members of a particular church, but whose activities are not

[1] In the Constitution of 1776 the quantity of land which could be taken without leave of the legislature was two acres and this leave had to be prior to the grant or gift; in 1851 the quantity was enlarged to five acres; and in 1864 it was for the first time provided that the sanction of the legislature could be prior or subsequent to the gift or conveyance.

limited to such members.[1] 2nd. The sanction of the legislature must be given expressly to each particular devise or bequest, and it is not enough that the charter of a religious corporation gives it the power to take and hold property, by gift, grant, devise or otherwise.[2] 3rd. A reasonable time is allowed for obtaining the assent of the legislature; and it has been held that a sanction given in 1886 to a purchase in 1883 was within a reasonable time. *Bennett v. Methodist Church,* 66 Md. 36; *England v. Prince George's Parish,* 53 Md. 472. 4th. The corporation must be in existence at the time the will or conveyance takes effect, and subsequent incorporation and legislative assent will not suffice. *State v. Warren,* 28 Md. 339. But a devise or bequest of real or personal property for any *charitable* uses will be upheld if the will directs the formation of a corporation to take the same and such a corporation is formed within twelve calendar months from the grant of probate.[3] 5th. To render legislative sanction unnecessary, not only must the quantity of land be five acres or less, but the purpose ex-

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[1] *Baltzell v. Church Home,* 110 Md. 244. The mere fact that an educational institution is under the control of a religious order does not bring it within Art. 38. *Spear v. Colbert,* 24 App. D. C. 187, affirmed in 200 U. S. 130; nor is the article applicable to conveyances prior to 1776,—the date of the Declaration of Rights. *Kelso v. Stigar,* 75 Md. 378.

[2] *Church Extension Society v. Smith,* 56 Md. 365. *Aliter* as to grants *inter vivos*: *Rogers v. Sisters of Charity,* 97 Md. 555; and compare Code 1911, Art. 23, sec. 340, with the decision in this case.

[3] Code 1911, Art. 93, sec. 328. *Chase v. Stockett,* 72 Md. 238; *Yingling v. Miller,* 77 Md. 104. The question whether this provision is applicable to a devise or bequest to a religious corporation for religious purposes does not appear to have been decided in Maryland. In other jurisdictions the authorities are conflicting. See 2 Words and Phrases, 1084 and 1085.

pressed in the Constitution must be expressed in the deed or will; and when the land ceases to be used for such purposes, it reverts to the grantor, although the consideration paid by the grantee may have been its full value.[1] But if the deed is void, either because it lacks legislative assent or because the purpose is not expressed; or if the property is afterwards diverted to an unauthorized use, the statute of limitations will begin to run in favor of the grantee in possession from the date of the void deed or of the diversion, as the case may be.[2]

Second. Where charter or statute imposes a limit upon the amount or value of property a corporation may own, there are two views as to the result, when the limit is ex-

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[1] *Grove v. Trustees*, 33 Md. 451; *Reed v. Stouffer*, 56 Md. 254; *Second Universalist Society v. Dugan*, 65 Md. 468.

[2] *Gump v. Sibley*, 79 Md. 165; *Rother v. Sharp Street Station*, 85 Md. 530; *Regents v. Calvary Church*, 104 Md. 635. Under the rule in these cases, adverse possession is substituted for the assent of the legislature required by the Constitution. This assent is always given as a matter of course and the prohibition of the Constitution has become of doubtful utility. The recent tendency of the courts has been to uphold titles depending upon compliance with the Constitution, and for this laudable end some fine and subtle distinctions have been drawn. See *Bennett v. Methodist Church*, 66 Md. 36; *Catholic Cathedral v. Manning*, 72 Md. 116; *Trustees v. Jackson Square Church*, 84 Md. 173.

The original statutes of mortmain applied to all corporations, ecclesiastical as well as lay, but they were directed against the Church. Mortmain=*mortua manus;* and land conveyed to a religious corporation was said to go into a dead hand because it became discharged of feudal duties and burdens. The feudal lord was deprived of his rights of wardship, marriage and escheat. For the devices invented to evade the statutes of mortmain and the history of the doctrine, see I Pollock and Maitland, History of English Law, 314, 639.

ceeded. In one view, the grant is void as to the excess; in the other, the corporation takes and may pass a good title until objection is made on the part of the state. In *McGraw's Estate,* 111 N. Y. 66, a testatrix had bequeathed to Cornell University a legacy of over one million dollars. The corporation already held property valued at more than three million dollars,—the limit of the charter. The court held the bequest void. In *Hanson v. Little Sisters of the Poor,* 79 Md. 434, the court, following the doctrine of the Supreme Court of the United States in *Jones v. Habersham,* 107 U. S. 174, reached the opposite conclusion, namely, "that restrictions imposed by the charter of a corporation upon the amount of property it may hold, cannot be taken advantage of collaterally by private persons but only by the State in a direct proceeding for that purpose."[1]

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[1] For an extension of the doctrine see *In Re Stickney's Will,* 85 Md. 79. See also, *Hubbard v. Worcester Art Museum,* 194 Mass. 280, 9 L. R. A. (N. S.) 689 and note. Religious corporations, formed under the general law, are limited (Code 1911, Art 23, sec. 340) to an income from property held of $20,000 a year. As to charitable and benevolent organizations, it is provided (sec. 101):

"When the value of the property owned by any charitable or benevolent society or corporation, incorporated under any general or special law of this State, or the income of such charitable or benevolent society from such property was, when the said property was acquired, within the limit or limits prescribed by law for the tenure and enjoyment of such property or income, but has hereafter increased in value, such benevolent or charitable association or corporation may lawfully hold, enjoy, use and deal with the increased value of said property or property derived therefrom, or with the increased income derived therefrom, for its said charitable and benevolent purposes in the same manner and to as full an extent as it might have enjoyed, used or dealt with said property or income, if the value of said property, or the amount of income derived therefrom, had not so increased."

Third. The rule which gives the state and to it only the right of objection where the charter limit is exceeded, has been applied to cases in which a statute makes the right of the corporation to acquire property conditional, but does not declare a conveyance in violation of the condition void. In *Fritts v. Palmer,* 132 U. S. 282,[1] a statute of Colorado provided that "No foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State except as provided for in this Act." The act required all corporations to qualify for doing business. A corporation of Missouri, in disregard of the law, took a conveyance of real estate in Colorado, which it thereafter mortgaged to the appellant, who bought in at a foreclosure sale. Ejectment was brought by the corporation's grantor; but the court held that inasmuch as the statute did not expressly declare the deed to the corporation "absolutely or wholly void," it took a good title subject only to objection on the part of the state in a direct proceeding.

Fourth. The same rule has been applied to cases in which a corporation has acquired land for purposes foreign to the scope of its charter. In *Hagerstown Land Company v. Keedy,* 91 Md. 430, the appellant had sold to a beneficial association some town lots. The vendee failed and its trustee instituted proceedings to procure a rescission of the sale, on the ground that the purchase was for an unauthorized purpose. It was held that "when a corporation has power to hold land for some purpose or to a limited extent,

[1] Compare *United States v. Fox,* 94 U. S. 315, in which the Government of the United States was held to be incapable of taking a devise of land in New York, because the law of that State prohibited devises of land to corporations, without legislative sanction.

its right to take and hold any particular parcel of land is a matter solely between the corporation and the state."[1] But in *Case v. Kelly*, 133 U. S. 21, a corporation by its receiver filed a bill in equity against the appellee to compel the conveyance of land, alleged to have been acquired by the appellee in trust for the corporation. It was conceded that the acquisition of the land was not authorized by the charter; but it was contended that this objection concerned the state alone. The court said: "The question here is not whether the courts would deprive the corporation of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones and that while a court might hesitate to declare the title to lands received already and in the possession and ownership of the Company void, on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law and enabling the Company to do that which the law forbids." And the bill was dismissed.

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[1] Following *Fritts v. Palmer*, 132 U. S. 282,—which is by a typographical error cited as *Fritts v. Pullman Company*. For a case in which the State objected, see *People v. Pullman Company*, 175 Ill. 125; and see *post*, Chap. XII.

"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs can impugn it upon the ground that the grantee has exceeded its powers." *Kerfoot v. Farmers Bank*, 218 U. S. 281,—holding that a conveyance of land taken by a national bank for a purpose not authorized by the national banking act is not subject to attack at the instance of the grantor's heirs.

Fifth. There is no principle of public policy which forbids a purely private corporation from disposing of all of its assets. With the consent of all of the members this may always be done;[1] and in Maryland, a statute provides that with certain exceptions, any corporation having a capital stock may sell, lease or exchange all of its property and assets as an entirety, including its good will and franchises, to and with any other corporation of this state which is authorized to acquire and hold such or similar property, provided that the transaction is approved by the directors and by two-thirds in interest of the stockholders entitled to vote.[2] But the public-service corporation is in a different position; it receives a franchise for purposes affected with a public interest, and without the consent of the state it has no right to dispose of or encumber its franchise or any part of the tangible property that is essential to the performance of its public duties.[3] In *State v. Consolidation Coal Company*, 46 Md. 1, the Cumberland and Pennsylvania Railroad had conveyed to the appellee all of its property of every description with its privileges and franchises; and the court,

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[1] *Stokes v. Detrick*, 75 Md. 256; *Glymont Co. v. Toler*, 80 Md. 278. Some cases hold that under certain circumstances (e. g. to pay debts) this power is vested in the majority. See 7 Am. & Eng. Ency. 734 and the dictum in *Gibbs v. Consol. Gas Co.*, 130 U. S. 396. The majority can accomplish the same result by formal liquidation proceedings; and the directors may authorize a conveyance of all the corporate assets to a trustee for the benefit of creditors. *Miller v. Matthews*, 87 Md. 474.

[2] Code 1911, Art. 23, sec. 32,—which also protects the rights of dissenting shareholders. Sec. 103 permits the purchasers at a foreclosure sale to acquire and transfer to a new corporation the franchises and property purchased. Sec. 294 contains a special provision for railroads.

[3] *Central Trans. Co. v. Pullman Co.*, 139 U. S. 26.

after announcing the rule as stated, said: "The deed was inoperative and void, passed no title to the appellee in the franchises, railroad and other property of the Cumberland and Pennsylvania Railroad Company and the latter Company continued to hold the same notwithstanding the deed." Corporate charters and, usually, general incorporation laws (e. g. Code 1911, Art. 23, secs. 297, &c.) permit a public service corporation to mortgage its property, franchises and immunities. Difficult questions arise when a purchaser, on foreclosure, claims the benefit of the mortgagor's special immunities, e. g. exemption from taxation. Illustrative cases are cited in the note, and it will be seen that the presumption is always and strongly against such claim.[1]

Sixth. Where there are no statutory provisions, some diversity of opinion exists as to the power of a corporation to acquire its own shares after the same have been duly issued; and where the power is denied, the denial is placed upon two grounds. 1st. It is said that such a transaction is necessarily foreign to the scope of the charter, and, 2nd, that the result works a merger of the shares so acquired, and consequently a reduction of the capital stock—the stake pledged for the benefit of creditors.[2] In a recent Maryland case it was said: "It seems perfectly manifest that a corporation by the purchase of its own shares, in the absence

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[1] *Railroad Co. v. Ocean City*, 89 Md. 97; *Railroad Co. v. Wicomico County*, 93 Md. 113:203 U. S. 112:103 Md. 277; *Butler v. Rahm*, 46 Md. 541; *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. Anne Arundel County*, 103 U. S. 1; *Honolulu Co. v. Wilder*, 211 U. S. 137; *Great Northern R. Co. v. Minn.*, 216 U. S. 206, and notes to in 54 Law. Ed. 446.

[2] See the reasoning of Lord Herschell in *Trevor v. Whitworth*, L. R. 12 Appeal Cases 412; *In Re. Dronfield Coal Co.*, L. R. 17 Ch. Div. 76.

of legislative authority permitting that to be done, diminishes its capital to the extent of the shares so purchased. * * * If such purchases effect a reduction of the capital stock, then, as that method of reducing the stock is not the method prescribed by the Code, it must of necessity be an unlawful method."[1] But it is settled that to save itself from an apprehended loss a corporation may acquire its own shares.[2] Here there is no merger; the shares may be

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[1] *Burke v. Smith,* 111 Md. 626; *Maryland Trust Co. v. Bank,* 102 Md. 608. It was also said in the latter case that, from the want of power in the corporation to release an unpaid subscription to its stock, it follows as a necessary consequence that the corporation is without authority to buy its own shares. The corporation involved was one whose shares were subject to an extra statutory liability in favor of creditors which was, *pro tanto,* destroyed by the transaction complained of, but the language of the opinion is sweeping in its scope—perhaps unintentionally so. The true test, it is submitted, regards not the fact of purchase, but the purpose and result in the particular case.

See the authorities collated in 61 L. R. A. 621 and 25 L. R. A. (N. S.) 50. See also, *Leland v. Hayden,* 102 Mass. 542; 2 Thompson Corp., sec. 2062; 18 L. R. A. 252, note. In *Gilchrist v. Highfield,* 140 Wis. 476, it is said that the great weight of authority is in favor of the proposition that a corporation may purchase its own stock, when the power is not intended to be exercised for an illegitimate or fraudulent purpose, and when no rights of creditors are affected. This case is exhaustively annotated in 17 Anno. Cas. 1261.

[2] *American Co. v. Haven,* 101 Mass. 398; *Williams v. Savage Mfg. Co.,* 3 Md. Ch. 450. National banks are forbidden to lend money on the security, or become the purchaser, of their own shares, except to prevent loss from any debt previously contracted; but a violation of the law does not make the transaction void. *Lantry v. Wallace,* 182 U. S. 537; *Bank v. Stewart,* 107 U. S. 676; *Bank v. Bank,* 39 Md. 600, affirmed, 92 U. S. 122.

re-issued; but pending re-issue the corporation cannot vote them.[1]

A similar diversity of opinion exists as to the right of a corporation to acquire the shares of another. The right is denied, sometimes on the ground of public policy and sometimes as foreign to the scope of the charter.[2] Other decisions sustain the right to acquire even a controlling interest resulting in the suppression of competition,—so long as no fraud is practiced upon the minority stockholders of the corporation controlled.[3] The formation of a corporation for the purpose of holding the shares of another is generally held not to be unlawful unless the result is to violate some statute declarative of public policy; or to "freeze out" the minority in the subsidiary company.[4]

§ 39. **Consolidation.** There is no inherent power in a corporation to make a change so organic as that involved in consolidating with another. The consent of all the members is not enough without the consent of the state; nor can the permission of the state, without more, authorize a consolidation over the opposition of a single dissenting

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[1] Code 1911, Art. 23, sec. 18, provides that "No corporation shall directly or indirectly vote any shares of its own stock, except such as it holds * * * as trustee * * * ."

[2] *Bank v. Kennedy,* 167 U. S. 362; *De la Vergne Co. v. Bank,* 175 U. S. 40; and see notes in Law. Ed. 44, p. 65; *People v. Gas Co.,* 130 Ill. 268: 8 L. R. A. 497.

[3] *Cannon v. Brush Electric Co.,* 96 Md. 446; *Davis v. Electric Co.,* 77 Md. 35; *Booth v. Robinson,* 55 Md. 419. See Code (1911), Art. 23, secs. 7 and 302.

[4] For "Holding Companies" see *Northern Securities Co. v. United States,* 193 U. S. 197; and generally, Machen on Corporations, secs. 52, 59, 60 and 302, and notes to *Morel v. Hoge,* 130 Ga. 625 in 16 L. R. A. (N. S.) 1136. Compare *United States v. Union Pac. R. Co.,* 226 U. S. 61.

member.[1] If a law existing at corporate birth vests the power in some given proportion of the shareholders, the minority must be taken as assenting. And if the state has reserved the power to amend the charter, it may vest the power of consolidation in a majority of the members;[2] or it may revoke an existing power of consolidation.[3] But, however granted, the power, being statutory, must be exercised according to the terms of the grant and upon these terms the results of consolidation depend. It follows consequently, that most of the decisions deal with the construction of some particular statute or charter rather than with general principles of law. The chief matters for attention are these:

First. The general incorporation law[4] provides that any two or more corporations organized under any law of this State—presumably including both general and special laws—which have been incorporated for the purpose of carrying on, in whole or in part, any kind of business of the same or similar nature, may consolidate, provided that the transaction is approved by the directors of each corporation and also by two-thirds in interest of the stock outstanding and entitled to vote. A certificate in prescribed form is required

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[1] *Ferguson v. Meredith,* 68 U. S. 25.

[2] This is the prevailing opinion. See 7 Thompson Corp., sec. 8231. In Maryland, all charters granted since the Constitution of 1851 took effect may be repealed, and within certain limitations, amended. See *post,* Chap. XIX.

[3] *Pearsall v. Railroad Co.,* 161 U. S. 646; *Gibbs v. Consol. Gas Co.,* 130 U. S. 396.

[4] Code 1911, Art 23, sec. 29; note special provisions for particular classes of corporations,—e. g. railroads, sec. 283; lighting companies, sec. 151. Provision is made by sec. 31 for the rights of dissenting shareholders.

to be executed and recorded, whereupon "all the property and assets belonging to said former separate corporations of whatsoever nature and description, and all the powers and rights and all debts and liabilities of said former separate corporations of whatsoever nature and description, shall, upon such recording, as aforesaid, be devolved upon said new consolidated corporation, which shall be regarded as substituted by operation of law in the room and stead of said former separate corporations."

The provisions just quoted govern corporations having a capital stock. For the consolidation of corporations having no capital stock, special provision is made.[1] These may unite with corporations incorporated for a similar purpose and having no capital stock, provided that a majority of the members of each of the corporations entering the consolidation assent thereto. A certificate in form prescribed is required to be executed and recorded, whereupon "all the property and assets belonging to said former separate corporations and all their powers and rights and all the debts and liabilities of said former separate corporations shall be devolved upon said new consolidated corporation, and every devise or bequest in favor of either of the former separate corporations which it would have been capable of taking shall devolve upon said new consolidated corporation, which shall be regarded as substituted by operation of law in the place and stead of said former separate corporations."

Second. In the proper sense of the word, consolidation results in the creation of a new entity into which the constituent corporations are merged and dissolved; but sometimes the result contemplated by the enabling statute is a union or alliance of two or more corporations rather than

[1] Code 1911, Art. 23, sec. 89.

a true consolidation. The distinction is important. If a new corporation has been born and the former ones have passed away, its rights and powers are determined by the law existing at the date of its birth, and the immunities, exemptions, and those powers of the constituent companies which are in their nature personal, may be held to have died with them.[1] Particularly is this true of a special exemption

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[1] In *Diggs v. Fidelity Co.*, 112 Md. 50, the court, speaking of the effect of a consolidation on the un-issued bonds secured by the mortgage of a constituent corporation, said:

"Both the statute under which this consolidation was made and the decisions of this Court in construing similar consolidations require us to hold that the corporate existence and powers of both the Gas and the Power Company perished in the process of consolidation and that the resultant Consolidated Company was a new and separate corporation and that the rights then conferred on it were acquired by a new and special grant from the State and did not accrue to it by way of transfer from the constituent corporations or either of them * * * It is true that the means adopted by the Legislature to carry into effect its purposes involved *the extinction of the life of the constituent corporation* and the creation of a *new corporation which is a legal unit* and not a mere association or aggregation of coexisting corporations. The rights and powers received by it, from the State, at its formation, although identical in character with those which had been possessed by the extinct constituent corporations, are its own rights and powers and are exercisable by it alone. The property and franchises formerly held by the extinct constituent corporations, which devolved through the consolidation on the new corporation, thereby became its own and are held by it in its own right with the same powers of use and disposition as those enjoyed by other corporate owners of property and the respective portions of it which came from the several constituents no longer have any separate legal existence. It may in its discretion apply particular portions of its property to like uses and in the same enterprises to those in which they had been formerly employed by the constituent corporations from which they came,

or privilege, such as an immunity from taxation or the right to fix and determine freight rates; these will not pass to the new corporation by implication merely.[1]

Third. Except for special privileges and personal powers, and subject always to the terms of the enabling act, the rights, powers and privileges of the new corporation are the sum of those of its constituents. It succeeds to their assets and takes over their obligations both in contract and in tort.[2]

Fourth. Statutes authorizing consolidation will not be construed, by implication merely, to include those engaged in the public service, where the result would be to suppress competition. In most of the states, there are statutory provisions prohibiting the consolidation of railroads operating

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but in so doing it holds and uses the property in its own right and on its own account and not as and for the extinct constituent corporation or in a special capacity as its successor."

See also, *Orrick v. Fidelity Co.*, 113 Md. 239 and *State v. Gas Co.*, 104 Md. 364.

[1] *Railroad Co. v. Missouri*, 152 U. S. 301, in which the earlier cases are reviewed; *Railroad Co. v. Gill*, 156 U. S. 649; *Wright v. Georgia &c. Railroad Co.*, 216 U. S. 420; *San Antonio T. Co. v. Altgelt*, 200 U. S. 304; *Yazoo &c. R. Co. v. Vicksburg*, 209 U. S. 358; *State v. Railroad Co.*, 44 Md. 131; *Railroad Co. v. Maryland*, 187 U. S. 263; *Taggart v. Railroad Co.*, 29 Md. 559.

[2] Some of the decisions limit the liability of the new company to the extent of assets received. See *Smith v. C. & O. Canal Co.*, 14 Pet. 45; and the comment thereon in 1 Thompson, Corp. sec. 673; see also note to *R. R. Co. v. Hall*, 23 L. R. A. 231; and compare *Taggart v. R. R. Co.*, 29 Md. 559. For the liability of the consolidated company for the torts of one of its constituents, see *State v. R. R. Co.*, 77 Md. 492. Of course, the creditors of a constituent company are not required to accept the liability of the consolidated corporation, but in a proper case may follow the property of their debtor. 1 Thompson, Corp. sec. 379.

parallel or competing lines; and such provisions are strictly construed in favor of the public.[1]

Fifth. For the purposes of federal jurisdiction depending upon diverse citizenship, a corporation is conclusively presumed to be composed of citizens of the creating state. Where interstate railroads are consolidated, the consolidated company is treated in each state concurring in its creation, as a citizen thereof.[2]

§ 40. **Changing the capital stock.** A corporation has no inherent power to issue stock,[3] and, consequently, in the absence of express grant, it can neither increase nor diminish the amount of an authorized issue. And this is true, although all the members consent. Reducing the capital stock is open to the objection that you thereby diminish the fund pledged for creditors; and this is a good reason for restricting the power. But there is not so much substance in the reason usually given for denying the power to increase without legislative sanction,—namely, that the corporation may thereby acquire an undue amount of capital. Corporation laws, generally, permit organic changes by means of amendments[4] and so furnish a method for changing the nominal capital stock; but the point for emphasis is, that whether conferred by a special act or by general law, the power is statutory and must be exercised as granted. Shares which the corporation has no authority to issue are

[1] E. g. Code 1911, Art. 23, sec. 283. *Railroad Co. v. Kentucky,* 161 U. S. 677. For the difference between consolidation and other forms of merger, see Noyes Intercorporate Relations, Ch. 1.

[2] *Patch v. Wabash Railroad Co.,* 207 U. S. 277; Noyes, Intercorporate Relations, sec. 106.

[3] *Cook v. Marshall,* 191 Pa. St. 315.

[4] See *ante,* § 24, note 2.

void even in the hands of an innocent holder.[1] The general law contemplates four classes of cases: (1) Increasing the nominal capital stock; (2) diminishing the same; (3) reducing the par value of the outstanding shares without affecting the nominal capital stock; (4) in the case of certain classes of corporations, effecting, by a reduction of the nominal capital stock, the transfer of a portion of the capital to a surplus fund.

After the preliminaries prescribed for cases of amendment (*ante*, § 24, note 2), it is provided (Code 1911, Art. 23):

"26. If an increase of the capital stock of any corporation shall have been duly authorized, as in section 24 is provided, the articles of amendment shall also set forth (a) the total amounts of capital stock already authorized and issued; (b) the amount of cash paid in for stock already issued and the amount of stock already issued for property or services; (c) the amount of additional stock authorized; (d) and the classes, if any, into which the additional stock is to be divided, with the preferences, voting powers, restrictions and qualifications of the increased shares."

"27. If a reduction of the capital stock shall have been duly authorized, as in section 24 is provided, the articles of amendment shall also set forth (a) the total amounts of capital stock authorized and issued; (b) the amount of the reduction and the manner in which it shall be effected; (c) a copy of the resolution authorizing the reduction; but, except as provided in the next succeeding section, no corporation shall be entitled to reduce its capital stock until the amount of its unsecured debts and liabilities shall be

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[1] *Scovill v. Thayer*, 105 U. S. 143. Compare *Tome v. Railroad Co.*, 39 Md. 36 and *Moores v. Bank*, 111 U. S. 156.

so far paid and satisfied as not to exceed the amount to which the capital stock shall be reduced."

"28. When the capital stock of any corporation has become impaired by losses, the outstanding shares may be reduced to an amount representing their true value without reducing the amount of capital stock which, by its charter or certificate, the corporation is authorized to have; the outstanding certificates may be called in and new certificates issued for the proportionate number of shares as reduced, to the persons entitled thereto; and the stock representing the difference between the authorized issue and the number of shares as reduced may be re-issued without thereby increasing the capital stock, and may be classified as preferred or common. If such reduction in the number of shares shall be authorized as in section 24 is provided, the articles of amendment shall, in addition to the requirements of section 25, set forth: (a) the number of shares originally authorized; (b) the number of shares actually issued and outstanding; (c) the number of shares as reduced; (d) the classification, if any, of the stock representing the difference between the original authorized issue and the number of shares as reduced."

"119. It shall be lawful for the stockholders of any life insurance, accident insurance, safe deposit, trust or fidelity company, created by general law or special act, in general meeting assembled, from time to time, to provide for calling and cancelling the whole or any part of the capital stock, and issuing other stock instead thereof at such par value as they may decide on, to an amount not exceeding the true value of such stock, in such manner as to provide such contingent fund or surplus not represented by stock as they may decide to be necessary; provided that notice of every

such meeting of stockholders shall be given in the manner required by sections 15 or 16 of this article, and the proceedings thereafter shall be similar to those prescribed in sections 26 to 28 (both inclusive) of this article."

§ 41. **Preferred shares.** By unanimous consent the members of a corporation may, without express power, classify its shares and confer upon some of them privileges not enjoyed by the others. *Scott v. Railroad Co.*, 93 Md. 475. The power, however, is usually vested by special act or general law in some definite portion of the shareholders, and sometimes the statute gives to the preferred shares privileges that are beyond the inherent power of the corporation to confer. For example, in this State, before the passage of the Act of 1908, the holder of statutory preferred stock issued, occupied the anomalous position of being, at the same time, a shareholder in and preferred creditor of the corporation. The incidents of preference shares will be discussed hereafter. The points to be noted now are the following: 1st. Ordinarily a preferred share differs from a common one in that the former is entitled to dividends before any are set apart for or paid to the holder of the latter; and while, by unanimous consent, the shareholders may determine the rights of the preferred shares as among themselves, they cannot except by statute, give to such shares any priority over creditors. 2nd. Statutory preferred stock issued prior to 1908 is part of an increase, and is a lien on corporate assets.[1] 3rd. By the Act of 1908 (Code 1911, art. 23, sec. 34) it is provided: "Every corporation may create two or more classes of stock with such preferences, voting powers, restrictions and qualifications thereof as shall be

[1] *Heller v. Marine Bank*, 89 Md. 602, in which the former statute is quoted; *Leviness v. Consol. Gas Co.*, 114 Md. 559.

expressed in the certificate of incorporation or by any amendment to its charter or certificate which may be adopted in accordance with the provisions of this article. And by articles of amendment, any increased stock, and any unissued or reissued part of the original authorized issue, may be so classified. Such preferred stock may, if desired, be made subject to redemption at not less than par at a time and price to be expressed in the certificate of incorporation or articles of amendment; and it may be provided that the holders thereof shall receive and that the corporation shall be bound to pay a fixed annual dividend to be expressed in the said certificate or articles of amendment, payable, quarterly, half yearly or yearly before any dividend shall be set apart for or paid to the holders of the common stock; and such dividends may be made cumulative; and such stock may be preferred over the common stock as to its distributive share of the assets of the corporation upon dissolution; but in case of insolvency, the debts and other liabilities of the corporation shall be paid before the holders of such preferred stock shall receive anything. Nothing in the laws of this State shall be so construed as to limit the dividend on such preferred stock to six per cent. per annum if a greater or less dividend is provided to be paid on such stock."

§ 42. **Voluntary dissolution.** The life of a body corporate may expire by lapse of the time for which it was created; or because of its failure to comply with some self-executing condition of continued existence; or in the case of a corporation having no capital stock, by the loss of its members.[1] For good cause, such as the abuse or non-user of its franchise, the state may institute judicial proceedings

[1] See *post*, Chap. XXII, "Dissolution."

for forfeiture of the charter. But a corporation has no inherent power to terminate its own existence; nor has a court of equity inherently the power to dissolve it.[1] It may cease to do business, its assets may be taken by a receiver and distributed among the creditors, but the fictitious person is not thereby annihilated.[2] In theory, the relationship between the state and the corporation created by the grant and acceptance of the charter can only be dissolved by mutual consent, unless the state has reserved the right of repeal or has given its assent to some other method of dissolution. Such assent is usually provided by general laws, and in this State, it takes two forms:

First. When the corporation has become insolvent, the power is vested in courts of equity to enter a decree of dissolution upon a bill filed by a creditor or shareholder.[3] This power and the method of proceeding under it will be discussed more fully hereafter; it is enough to say now that in the exercise of the jurisdiction the court goes no further than the statute requires.[4]

Second. The holders of a majority of the shares (or of each class of shares, if there are several classes) of a stock corporation, other than a public service corporation, and a majority of the members of a non-stock corporation,—may authorize a bill to be filed for a voluntary dissolution.[5]

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[1] *Barton v. Fraternal Alliance,* 85 Md. 14; *Mason v. Equitable League,* 77 Md. 483.

[2] *Swan Co. v. Frank,* 148 U. S. 612.

[3] Code 1911, Art. 23, sec. 78.

[4] *Callaway v. Powhatan Co.,* 95 Md. 185; *Steinberger v. Savings Inst.,* 84 Md. 635. The latter case defines insolvency as the inability to pay debts in the ordinary course of business.

[5] Code 1911, Art. 23, sec. 76. In *Du Puy v. Transportation Co.,* 82 Md. 436, the directors passed a resolution for the winding up of

§ 43. **Miscellaneous statutory powers and limitations.** Special powers are conferred upon particular classes of corporations,—such as the right of condemnation; and, conversely, there are special limitations. With certain exceptions, a corporation may not lend money to any stockholder or director;[1] a bridge company may not erect its structures without consent of the county commissioners, and of the legislature, in the case of a navigable stream;[2] no land company or homestead or building association may issue to any borrower, in lieu of money, any note, bill or obligation;[3] no corporation may act as agent for the purpose of procuring a loan of money on the security of chattels;[4] no cemetery company may hold for the purposes of burial more than one hundred acres of land, or any ground within the limits of any city or town, without the consent of the municipal authorities;[5] a railroad or mining company may not own,

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the corporation, and in pursuance thereof, executed an assignment for the benefit of creditors. The company was apparently not insolvent and the trustee under the deed reported to the court a fictitious sale of the assets. It was said that "if the real object of the deed of trust was to wind up the affairs of the corporation under a pretext of paying creditors, then the proceeding was illegal because a corporation can only be wound up in the manner prescribed by the Code." But this statement is too broad. A voluntary liquidation out of court is not illegal, but is recognized by sec. 80 of Article 23.

[1] Code 1911, Art. 23, sec. 75. Art. 11, sec. 64, as amended by chap. 194, of the Acts of 1912, contains special provisions for banks and trust companies.

[2] Code 1911, Art. 23, secs. 125 and 131. And see *Railway Co. v. Smith, Governor,* 97 Md. 180.

[3] Code 1911, Art. 23, sec. 143. *Davis v. Building Association,* 32 Md. 285.

[4] Code 1911, Art. 23, sec. 124.

[5] *Ibid,* sec. 144.

conduct or carry on any store.[1] The above list is neither interesting nor exhaustive. Some of the prohibitions serve a useful purpose, while others are more or less arbitrary and barren of principle.

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[1] *Ibid*, sec. 311.

PART IV.

HOW THE CORPORATE POWERS ARE EXERCISED.

CHAPTER VI.

THE STRUCTURE OF A BODY CORPORATE AND THE FUNCTIONS PERFORMED BY ITS PARTS.

§ 44. **Scope of the chapter.** Having considered questions of existence and general powers, the next step is to investigate the structure of the corporate body; to see how its functions are performed and how the granted powers are exercised. It must first be noted that there are diversities of structure resulting from the different ways in which the corporate franchise may be vested. In the case of a stock company, for example, there is no difficulty in telling who constitute the corporation; here the franchise is vested in the shareholders for the time being and they are the members of the corporate body. In corporations having no capital stock there are variations. Sometimes the franchise is limited to the charter members and their successors; and these may be selected by co-optation,—as in the case of a so-called close corporation; or elected periodically by persons who are not members of the corporate body,—as in the case of incorporated religious societies.[1] Again, the right to be a corporation may be conferred upon the incorporators and their future associates,—in which case the latter, upon

[1] See Annotations, Code (1911) Art. 23, sec. 339.

election, become members of the corporate body. In the following discussion, a stock corporation is taken as the type and where necessary, the variations are noted.

§ 45. **Agency**. From inherent necessity, an artificial person can manifest its will only by the act of some natural person; and the binding force of every act done in its name must depend upon the authority of this natural agent. Assuming, then, the existence of the corporation and its capacity to engage in the particular transaction, who are the natural persons authorized to speak or act for it? The guiding principles are these:

First. The shareholders, when duly assembled in corporate meeting, are the primary agents of the corporation, but they do not directly administer its affairs. They elect a board of directors or managers, to which the administrative powers are delegated; and they establish by-laws for the government of this board.

Second. The directors or managers, as the name may be, when duly assembled in board meeting, are the administrative agents of the corporation,—that is to say, they direct its policy and, directly or by delegation, exercise its ordinary powers. But they cannot exercise its extraordinary or constituent powers,—those which relate to fundamental acts and organic changes. These are usually reserved to the corporation at large by the creating statute;[1] but where the statute is silent, the result is the same.

In *R. R. Co. v. Allerton*, 85 U. S. 233, the directors, without consulting the shareholders, passed a resolution to increase the capital stock, and the appellee, a shareholder, filed his bill for an injunction. The charter of the company

[1] Code (1911) Art. 23, sec. 10.

provided that its capital stock might be increased at the pleasure of the corporation, and that all of its corporate powers should be vested in the board of directors. The court said that by its true construction, the charter did not vest in the directors such a fundamental power as that claimed by them. And in *Bank v. Weinhard,* 192 U. S. 243, it was held that the question of levying an assessment upon the stockholders of a national bank for the purpose of restoring its capital and avoiding liquidation, was a question for the stockholders and not for the directors to decide. So long, however, as the directors are in office and are acting within the scope of their authority, their control is absolute and beyond interference on the part of the members; all that the latter can do, if dissatisfied, is to wait for the next election.[1]

Third. The directors[2] choose the officers of the corporation and, mediately or immediately, engage its employees and servants. An officer differs from an employee in that he is a member of the organization, occupying some recognized office;[3] a director technically, is an officer, but differs in that, merely as such and apart from the board, he is not an agent for any purpose. The board may and usually does confer executive powers upon one or more directors; but these are derivative and not inherent in the director as such.[4]

[1] In Maryland there is a statutory provision, whereby a majority of all the members, or a majority in interest of the shareholders, may upon short notice, call an extraordinary meeting and remove and replace any president, director or directors. Code (1911) Art. 23, sec. 16.

[2] Code (1911) Art. 23, sec. 9.

[3] *Bank v. Ridgely,* 1 H. & G. 432.

[4] As to executive committees, see *Bank v. Trust Co.,* 102 Md. 635, and Code (1911), Art. 23, sec. 10.

Fourth. Except in the case of public corporations,[1] the law of agency, with its doctrines of implied powers, ratification and estoppel, runs through the whole subject of corporate action. An officer or customary agent must be taken, as regards third parties, to have all the powers usually incident to his position. An unauthorized act of the president may be made good by the ratification, express or implied, of the board of directors; an invalid act of the board may be one that a majority of the members can ratify; an act beyond the powers of the majority may be one that a larger number can authorize and therefore ratify. But an act beyond the powers of the corporation itself, cannot be made good by any amount of ratification.

Fifth. It is said above that the members are agents of the corporation only when assembled in corporate meeting and the directors only when acting as a board. This is the rule, and it is based upon the principle that the minority are always entitled to notice, consultation and deliberation. In some cases, however, the courts have upheld as corporate acts, transactions which the directors and members have approved outside of corporate or board meetings; and the principle of estoppel has been extended to acts beyond the powers of the directors, on the ground that the members had failed to disavow them in due time. The decisions are conflicting. In *De La Vergne Co. v. German Savings Institution*, 175 U. S. 40, a contract had been executed in the name of a corporation by its president, all the shareholders joining, whereby it was agreed to transfer to the appellant the corporate assets then in the hands of a trustee, to whom they had been assigned for the benefit of creditors. The appellant agreed to take the assets subject to the debts and

[1] *Mayor v. Musgrave*, 48 Md. 289.

to issue to the selling shareholders its own shares in payment for the assets sold. Suit was brought to compel delivery of the shares; but the court, among other objections to the transaction, said that there was no consideration for the agreement made by the appellant, because "a conveyance of all the assets of a corporation is not within the powers of the shareholders, even though they all sign it, without formal action at a meeting held for that purpose." In *Duke v. Markham,* 105 N. C. 131, the appellant was claiming as mortgagee against a subsequent judgment creditor. The mortgage had been executed in due form, but not in pursuance of any resolution of the directors. It appeared that the secretary had consulted, informally, a majority of the directors, who were also shareholders, and had been told to go ahead. He went; but the court held the mortgage void, although the corporation had received and used the mortgage money. On the other hand, in *Stokes v. Detrick,* 75 Md. 257, there were two corporations having some directors and shareholders in common. By a resolution of the board, but without the formal sanction of the shareholders, one company had conveyed all of its assets to the other. The act was conceded to be beyond the power of the board; but the court sustained the deed, saying that the assent of the shareholders could be "inferred from their failure to protest against and promptly condemn the unauthorized acts of the officers of the corporation." In *Miller v. Matthews,* 87 Md. 474, the president and the secretary of a corporation, without any resolution of the board, executed an assignment for the benefit of its creditors and subsequently announced the fact to the other parties in interest. The deed was upheld on the ground that "the act which they performed, if subsequently acquiesced in by the other directors or a majority of them, rendered the assign-

ment in all respects as valid as if it had been made in pursuance of a resolution passed by the whole board of directors."[1]

§ 46. **Modal requirements.** In the old law the common seal was the mode, and the only mode, of uniting the assent of the members and evidencing the will of the corporation. If this seal was attached to a writing purporting to bind the corporation, it became bound, even if the seal had been stolen and affixed without authority.[2] The early rule broke down progressively and substantially in the following order: First it was admitted that the acts of an agent resting in parol, would bind the corporation if he had been appointed under the common seal; then, writing was recognized as a substitute for the seal; and finally came the rule that the authority of the agent and the will of the corporation may be proved and manifested orally, except where form is inherent in the transaction itself or is required by statute. It is substantially true that today the corporate seal is needed only where the seal of a natural person would be required in a similar transaction. The progressive stages

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[1] For the opposing view see the cases collected in the brief of the appellant's counsel; and particularly 3 Thompson Corp. 3905-3908.

[2] Pollock and Maitland's History of English Law, 490. The same thing was true of a natural person: "He has himself to blame if some one, at all events some one whom he has trusted, puts his seal to a bad use." And see 1 Blackstone 475: "For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

by which the present position has been reached are illustrated in the following cases:

In *Bank v. Dandridge,* 12 Wheat. 64, the appellant was suing the sureties of a defaulting cashier. The defense was that there was no minute or other writing showing the approval of the bond, although the cashier had filled the office for several years. The lower court sustained the defense and was reversed on appeal; but Chief Justice Marshall dissented and insisted that the inability of a corporation to manifest its will other than by writing was immutable. "The corporation being one entire entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. Can such a being speak or act otherwise than by writing; being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions or declare its will without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine none other than writing." This case was decided in 1827, and the best answer to the question put by the Chief Justice is to be found in a contemporaneous opinion of the Maryland Court of Appeals, delivered by Chief Judge Buchanan. In *Bank v. Ridgely,* 1 H. & G. 426, also a suit on the bond of a cashier, two objections were taken. First, that the by-laws offered in evidence did not appear by any minute in writing to have been adopted by the corporation; and, second, that there was no written evidence that the cashier's bond had been accepted. The court said: "The attenuated notion that the seal only was capable of binding the several assents of the individuals composing the community and making one joint assent of the whole, has yielded to the sober sense of

mankind, which no longer delights in mere technicalities. * * * By what law or on what principle has writing been substituted for the common seal? * * * We know of no such rule in practice; the general principles of evidence acknowledge none such, and when the Acts creating the corporation do not direct it, we do not perceive why their acts must be established by positive record proof only; and why the corporate assent may not be inferred from facts and circumstances which in regard to individuals would be decisive in relation to transactions of a similar character." So, it has been held that "not only the appointment but the authority of the agent may be implied from the adoption of his acts by the corporation or its directors;"[1] that in the absence of written minutes, transactions at a corporate meeting may be proven by oral testimony;[2] and that oral testimony is admissible to prove that a written order entered on the minutes of the directors was rescinded by a subsequent verbal order of which no minute was made.[3]

§ 47. **The passing of the seal.** So little remains of the old doctrine, that "in the absence of evidence to the contrary, a scroll or rectangle containing the word seal, opposite the signature of a corporation by its president will be deemed to be the proper and common seal of the company;"[4] and even where the charter requires an act to be

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[1] *Eckenrode v. Chemical Co.*, 55 Md. 65.

[2] *Handley v. Stutz*, 139 U. S. 417.

[3] *Whittington v. Bank*, 5 H. & J. 489.

[4] *Jacksonville v. Hooper*, 160 U. S. 518. For the effect of a corporate seal on negotiable instruments, see *Jackson v. Myers*, 43 Md. 452; *Muth v. Dolfield*, 43 Md. 466; *Hamburger v. Miller*, 48 Md. 317. In *Insurance Co. v. Anderson*, 79 Md. 379, it is said that "policies

done under the corporate seal, non-compliance will not invalidate the transaction. In *Insurance Co. v. McGowan,* 16 Md. 47, suit was brought in covenant on a policy of insurance and it appeared at the trial that the policy had expired before the fire, and had been renewed by a renewal receipt not under seal. The pleadings were amended to assumpsit and the plaintiff recovered. The charter of the company provided that all of its policies should be sealed with the common seal; and on appeal the court, two of the judges dissenting, said that the company had no authority to issue any other than a sealed policy; and that "this prohibition, if there were none other, would be a sufficient answer to the plaintiff's right of recovery." But in *Cahill v. Insurance Company,* 90 Md. 333, a grant of an annuity was attacked on the ground that it was not under the corporate seal. The court said that even if this formality was required by the charter, the grant was none the less good, because at most the defect constituted merely an irregular exercise of a granted power.

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of life insurance not declared on as sealed instruments, will not be excluded from the consideration of the jury as specialties where the seal consists simply of an emblem or symbol printed by the printer when the printed blanks were struck off, which was never adopted by the company as its seal"; and see further: *Smith v. Medical College,* 110 Md. 441; *Phillips v. Insley,* 113 Md. 348.

CHAPTER VII.

CORPORATE MEETINGS.

§ 48. **Requisites.** Whatever may be the effect of acquiescence, every member has the right by timely objection, to insist that powers reserved to the corporation at large shall be exercised in corporate meeting. And this means a meeting duly called, warned and held. The call must be made by the proper authority; due notice must be given of the time and place of holding and, in some cases, of the business to be transacted; the required number of members or shares must be present or represented; and the requisite number of votes must be cast. What constitutes a proper call, due notice and a sufficient quorum and vote depends upon the nature of the meeting and the business done; and the subject is not free from confusion. It must always be remembered that, subject to the charter, which, in its turn, may be subject to some governing statute, the by-laws of a corporation may lawfully regulate the matter and that the provisions of the statute, charter and by-laws are controlling in the order named. Where there are no such special provisions, the principles established by the weight of authority are the following:

First. In the normal course of its career, every corporation holds at periodic intervals, usually annual, its regular

meeting,—the time and place being fixed by the charter or by-laws. A regular meeting is a general one, that is to say, open for the transaction of any business; nor is any member entitled to previous notice either of the meeting or of the business proposed to be done.

Second. A meeting held between the regular intervals is an extraordinary meeting,—of which a member is entitled to notice of the time, place and object.

Third. If the power to be exercised is statutory, and the statute provides for a meeting "called for that purpose"; or if the statute in terms provides for notice of the purpose,—then it must be given, whether the meeting be regular or extraordinary.[1] Courts, however, are reluctant to inter-

[1] *Insurance Co. v. Farquhar,* 86 Md. 674. The present law of Maryland is found in Code (1911), Art. 23:

SEC. 14. Every corporation, which is subject to the provisions of this article, shall hold annually a stated or regular meeting for the election of directors and for the transaction of general business; the time and place of holding such meetings, and the notice to be given thereof and of the business to be transacted thereat, may be regulated by the by-laws; and unless otherwise provided by the by-laws, each shareholder or member shall be given notice of the place, day and hour of such meeting in the manner provided for in the next succeeding section; and such annual meetings shall be general meetings—that is to say, open for the transaction of any business within the powers of the corporation without special notice of such business, unless such notice is required by this article or by the by-laws.

SEC. 15. At any time in the interval between regular meetings, extraordinary meetings of the shareholders or members may be called by the president, or by a majority of the board of directors, or by a majority of the executive committee (if the by-laws provide for an executive committee, and confer such power upon such executive committee), upon ten days' written or printed notice, stating the place, day and hour of such meeting and the business proposed

fere with the action of the requisite majority on the ground merely of irregularity in the call and notice. In *Shaw v. Davis,* 78 Md. 318, the view of an English judge is quoted with approval: "In my opinion, if the thing complained of is a thing which in substance a majority are entitled to do, or if something has been irregularly done, which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority has the right to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called and that ultimately the majority gets its wishes."

§ 49. **By whom corporate meetings may be called.** In the absence of special provisions (statutory, charter or by-law, in the order named), the power to call extraordinary meetings is vested in the board and not with the president or other officer. Such special provisions are usual; and in this State they are as follows (Code 1911, Art. 23, sec. 16):

"Upon the request in writing delivered to the president or secretary or any director, of a majority of all the mem-

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to be transacted thereat; such notice shall be given to each shareholder or member by leaving the same with him or at his residence or usual place of business, or by mailing it, postage prepaid, and addressed to him at his address, as it appears upon the books of the corporation; and no business shall be transacted at such meetings except that specially named in the notice.

SEC. 23. Notice of the time, place and purpose of any meeting, whether required by the by-laws or by any provisions of this article, may be dispensed with if every member or shareholder shall attend in person or by proxy; or if absent shall by writing, to be filed with the records of the meeting, waive such notice.

See further as to waiver by actual presence, *Handley v. Stutz,* 139 U. S. 417; *Tompkins v. Sperry,* 96 Md. 560.

bers, or of the holders of a majority of all the shares outstanding and entitled to vote, it shall be the duty of such president, secretary or director to call forthwith a meeting of the shareholders or members. Such request shall state the purpose of the meeting, and notice thereof shall be given as required by the next preceding section. If the person to whom such request in writing shall have been delivered shall fail to issue a call for such meeting, within three days after the receipt of such request, then the shareholders owning a majority of the voting shares, or members constituting a majority of all the members, may do so by giving fifteen days' notice of the time, place and object of the meeting by advertisement inserted in a newspaper published in the county or city in which the principal office of the corporation is situated."

§ 50. **Quorum.** In every association the number of members whose presence is necessary to constitute a meeting is called a quorum.[1] And the older law draws a distinction between bodies having a fixed and definite number of members and those in which the number is fluctuating. In the former case, a majority of the membership constitutes a quorum for the transaction of business; in the latter, the members who actually appear after all have been warned, may hold a valid meeting.[2] And the corporation will be

[1] "It was usual to nominate members of a committee of whom (*quorum*) a certain number must be present to form a meeting"—Skeat's Etymo. Dict.—Quorum.

[2] In England it seems that at least two natural persons must be present to hold a corporate meeting and that one man, with proxies, will not do: *Sharp v. Dawes*, 47 L. J., Q. B. 104; but see *East v. Bennett Bros.* (1911), 1 Ch. 163. See also, *contra*, the instructive opinion in *Morrill v. Little Falls Co.*, 53 Minn. 371; the same case is reported with a valuable note on the subject of quorums, in 21 L. R. A. 175.

bound by any act which a majority of those voting resolve upon,—members present but not voting being presumed to acquiesce in the result. The modern law draws this same distinction and somewhat illogically treats the membership of a stock corporation as a fluctuating body. A valid meeting of the directors requires the presence of a majority of the whole board; a meeting of shareholders duly called and warned may be held by those actually appearing in person or by proxy, although they represent less than a majority in interest; and a major part of the shares voting may bind the corporation. Of course, a statute, or the charter or by-laws may determine the quorum; and if a particular power is vested in the majority or some greater number of the members or shares, this number must be present and represented or there can be no meeting.[1]

§ 51. **Voting.** Every member is entitled to one vote which must be cast in person and not by deputy; and this is true both as to stock and membership corporations where the rule has not been changed by statute or charter. Such changes have, however, been made almost universally, and so natural is the modern policy which allows a vote for each share and permits voting by proxy, that it is hard to realize the statutory origin of the right. In *Taylor v. Griswold*, 14 N. J. L. 222, decided in 1834, the question was as to the

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[1] Code (1911), Art. 23, sec. 17, provides that all meetings of the shareholders or members shall be held within the State and requires a majority in interest of all the stock outstanding and entitled to vote, or a majority in number of all the members (present in person or by proxy) to constitute a quorum; and exception is made in the case of mutual insurance companies. A by-law in conflict with the statutory provision would be invalid. *Darrin v. Hoff*, 99 Md. 498.

validity of a by-law which permitted voting by shares; and the by-law was declared to be invalid because in contravention of the common law. The older charters usually contained special provisions for voting.[1] The provisions of the Maryland law are typical:

First. "No corporation shall directly or indirectly vote any shares of its own stock, except such as it holds, and is by its charter or certificate authorized to hold, as trustee, committee, guardian, executor, administrator, or in some other fiduciary capacity. Corporations holding shares in another corporation may vote the same by such officer, agent or proxy as the directors may appoint."[2]

Second. "In all corporations subject to the provisions of this article and having a capital stock, each shareholder shall be entitled to one vote for every share of voting stock standing in his name; but no shares shall be voted by any holder if any installment duly called thereon shall be overdue and unpaid; nor shall any increased stock which may be issued under the provisions of this article be voted until it has been paid in full. Shareholders or members may vote either in person or by proxy, but no proxy which is dated more than three months before the meeting at which it is offered, shall be accepted, unless such proxy shall, on its face, name a longer period for which it is to remain good."[3]

Third. "Any corporation subject to the provisions of this article may by its by-laws provide, through cumulative

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[1] In *Webb v. Ridgely*, 38 Md. 364, the charter gave a vote for each share up to twenty, and no more.

[2] Code (1911), Art. 23, sec. 18.

[3] *Ibid*, sec 19; for a general discussion of proxies, see *Pope v. Whitridge*, 110 Md. 468.

voting, for minority representation in the election of directors."[1]

Fourth. "Shares standing in the names of fiduciaries may be voted by them and fiduciaries may, upon proof of title and qualification, vote the shares standing in the name of any person for whom they are authorized to act as executor, administrator, guardian, trustee or committee. A pledgor before sale shall be deemed to be the holder of his shares for the purpose of voting the same."[2]

Fifth. The by-laws, subject to any special provisions for particular classes of corporations, may provide for the manner of conducting meetings and elections: canvassing votes: verifying proxies; and the time preceding any meeting during which the books shall be closed against transfers of stock.[3]

§ 52. **Voting trusts.** It is a settled rule that all proxies are revocable unless coupled with an interest. And various

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[1] *Ibid,* sec. 20. In *Looker v. Maynard,* 179 U. S. 46, it was held that a statute which authorized cumulative voting, notwithstanding the opposition of the majority, was a valid exercise of a reserved power in the state to amend the charter. In cumulative voting, each share has as many votes as there are directors to be elected; and the holder may concentrate his votes on one or more of the nominees.

[2] *Ibid,* sec. 22.

[3] *Ibid,* sec. 12. In a stock corporation the person entitled to vote is the registered holder or his proxy, and the books are closed for the purpose of preparing the voting list. Canvassing the votes means requiring an oath from those offering to vote the shares that they are, or represent in good faith, the true owners. When, as was formerly common, the number of votes did not depend upon the number of shares, the right of canvassing was of some value; under the present law, which gives to each share a voting right, the matter is of little importance.

have been the devices, in recent times, to separate the voting power and the ownership of the shares. The plan usually pursued is to form a pooling agreement or voting trust, whereby for a period, more or less limited, the shareholder relinquishes his fraction of control over the corporation. There are conflicting decisions as to the validity of such agreements,—the weight of authority being against them. The reason usually assigned in opposition is the much overworked doctrine of public policy; but it is apparent that, subject to restrictions, such agreements serve a useful purpose and that some of the opposition to them is fanciful.[1]

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[1] 5 Thompson, Corp. sec. 6604; and see the notes to *Clarke v. Banking Co.*, 15 L. R. A. 683; and *Smith v. R. R. Co.*, 35 L. R. A. 309. In the latter case it was decided that an agreement restraining the power of voting the shares for five years so as to keep the control of the corporation from passing to other persons, when made by a person who has united in a purchase of a block of stock, is not illegal as in restraint of trade. In *Ryan v. McLane*, 91 Md. 175, it is said that a court of equity will not exercise its extraordinary power of compelling specific performance, in favor of a contract for the sale of shares, bought to enable the buyer to control a *quasi* public corporation like a railroad company,—although under some circumstances a contract for the sale of shares may be specifically enforced. The late cases are collected in 16 L. R. A. (N. S.) 1136 and 31 L. R. A. (N. S.) 1186. In Maryland the subject is now covered by statute: Code (1911), Art 23, sec. 102:

"A stockholder of any corporation of this State may by agreement in writing transfer his stock to any person for the purpose of vesting in him or them the right to vote thereon, for a time not exceeding five years, upon terms and conditions stated, pursuant to which such person or persons shall act. Every other stockholder, upon his request therefor, may by like agreement in writing also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement. The certificate of stock so transferred shall be surrendered and cancelled and certificates therefor issued to such trans-

feree or transferees, in which it shall appear that they are issued pursuant to such agreement; in the entry of such transferee or transferees as the owners of such stock on the proper books of said corporation, that fact shall also be noted, and thereupon he or they only may vote upon the stock so transferred during the time in such agreement specified; a duplicate of such agreement shall be filed in the principal office of the corporation and be open to the inspection of any stockholder, daily, during business hours."

CHAPTER VIII.

BY-LAWS.

§ 53. **Nature and scope.** Etymologically a by-law is a town law. "In the English shires where the Danes acquired a foothold, a town was called a 'bye,' and it had the power of enacting its own by-laws or town laws, as the New England towns have today."[1] The old meaning survives in the ordinance of a municipal corporation, which is binding not only upon the members but upon the stranger within the gates. So in the old crafts-gild, all members of the trade over which the gild had jurisdiction were bound by its by-laws regulating the trade, whether they were members of the corporation or not.

The modern conception is different. A by-law is a rule adopted by the members for the regulation of internal affairs and for the guidance of the directors in conducting corporate business; its binding force is limited to the membership;[2] and within this limit, it must conform to the charter and any governing statute and measure up to the standard of reasonableness fixed by the courts. There is no difficulty in determining whether a particular by-law is in conflict

[1] Fiske, American Political Ideas, 54.

[2] *Frank v. Morrison*, 58 Md. 423; *Tome v. Railroad Co.*, 39 Md. 36.

with the charter or some controlling statute;[1] but, naturally, the decisions present no uniform test of reasonableness. In this respect, however, there is a well-defined difference between the business corporation and others. In the latter, where there is a co-operative or social element more or less present, the by-laws may reasonably provide for the qualifications, loyalty and good behavior of a member and for his expulsion, if found delinquent. In the business corporation, the rights are regarded as inherent in the share rather than in the holder; his personality is a matter of indifference; and the settled tendency of the law is to strike down as unreasonable any by-law which interferes with the full ownership and free alienation of the share. But while this distinction between member and shareholder is aidful, it by no means solves all the difficulties which arise when the scope and reasonableness of a by-law are in question. The following cases illustrate a few phases of a large subject.[2]

§ 54. **Illustrative cases.** In *Insurance Co. v. Lodge,* 58 Md. 465, the appellee relied upon a usage to give notice of the amount and time for the payment of premiums. There was a by-law which fixed the time and amount. It was held that the policy had lapsed; that the by-law and not the usage prevailed;[3] and that "when a party takes out a policy in a mutual fire insurance company and the contract is completed, he at once becomes a member and is bound

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[1] *Darrin v. Hoff,* 99 Md. 491.

[2] See the cases collected in I Thompson, Corp., sec. 1022; and the notes to *Trust Co. v. Abbott,* 27 L. R. A. 271.

[3] But a usage which does not conflict with any by-law is binding. *Miller v. Eschbach,* 43 Md. 1.

by the rules and provisions of the by-laws and is presumed to have knowledge of them all."[1]

In *Pearsall v. Western Union Telegraph Co.*, 124 N. Y. 256, the directors had adopted a by-law limiting the liability of the company in the case of unrepeated messages. The plaintiff was both customer and shareholder and it was sought to charge him with constructive notice of the by-law. But the court said that this was merely a regulation of the mode in which the business should be transacted with customers and that it would be unreasonable to hold the plaintiff bound by it. In *Mottu v. Primrose*, 23 Md. 483, the directors were invested with the power of enacting by-laws and in exercise of the power they postponed the date previously fixed by an existing by-law for the corporate meeting—thereby extending their term of office. This was declared to be unreasonable. In *Flint v. Pierce*, 99 Mass. 68, a by-law made the members individually liable for the company's debts; but it was held that this gave a creditor no right of action that he did not already possess, unless he acted on the faith of it. In *People v. Live Stock Exchange*, 170 Ill. 566, a by-law was declared to be invalid as against public policy which prohibited the members of the association from employing as solicitors persons who were not members. In *Cross v. R. R. Co.*, 37 W. Va., 342, 18 L. R. A. 582, a by-law was upheld which provided that no one should be elected a director, who was attorney for the plaintiff in any litigation against the company. The following cases bring out clearly the distinction between the charter and the by-laws in respect to their binding force upon persons dealing

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[1] To the same effect is *Webb v. Insurance Co.*, 63 Md. 213. In a mutual insurance company the by-laws form part of the contract. *Dale v. Brumley*, 96 Md. 677.

with the corporation, who are not members. In *Reese v. Bank of Commerce*, 14 Md. 271, the charter of the appellee gave it a lien on its shares for any indebtedness due by a shareholder. The appellant was an endorsee for value of a certificate belonging to a shareholder who was indebted to the bank; and he was charged with constructive notice of the lien. In *Bloede Company v. Bloede*, 84 Md. 129, there was a by-law requiring a shareholder, before disposing of his shares, to give his fellow shareholders the right to buy at the price obtainable elsewhere. This was said to be void as in restraint upon alienation.[1] In *Grafflin v. Woodside*, 87 Md. 146, a by-law provided that no stockholder owing a matured debt to the corporation should transfer his shares until the debt was paid. This was held to be valid as against transferees with notice, but not as against innocent purchasers for value.[2]

§ 55. **The by-law making power: proof of by-laws.** In the absence of special provision, the right to make and alter by-laws belongs to the corporation at large, and not to the directors. And such is the statutory law in this State. The Act of 1908 (Code 1911, Art. 23, sec. 12) provides that "the power to make, alter and repeal by-laws shall reside in the members and not in the directors." And by sec. 13: "A copy of the by-laws of any corporation incorporated under the laws of this State, certified to be a true copy under its seal by the president and secretary or treasurer thereof,

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[1] See note to *Trust Co. v. Abbott*, 27 L. R. A. 271; and *post* §56.

[2] In *Bullard v. Bank*, 18 Wall, 589, there was a by-law giving the corporation a lien on its shares. But the court declared it to be invalid because national banks are not permitted to lend money on shares of their own stock. And see *Hammond v. Hastings Co.*, 134 U. S. 401; and *post* §56.

shall be received as *prima facie* evidence of such by-laws in the courts of this State."

§ 56. **Further statutory provisions.** By the revision of 1908 (Code 1911, Art. 23, secs. 3 and 33), restrictions upon the transferability of shares are authorized, if provided for in the certificate of incorporation and plainly stated on the certificate of stock. And the Uniform Stock Transfer Act of 1910 (Art. 23, sec. 52) changes, so far (but only so far) as Maryland corporations are concerned, the rule in *Reese v. Bank of Commerce,* 14 Md. 271, and *Hammond v. Hastings Co.,* 134 U. S. 401, which imposes constructive notice of liens and restrictions in the charter: "There shall be no lien in favor of a corporation upon the shares represented by certificates issued by such corporation, and there shall be no restriction upon the transfer of shares so represented, by virtue of any by-law of such corporation or otherwise, unless the right of the corporation to such lien or the restriction, is stated upon the certificate."[1]

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[1] See *post,* Chap. XVII—"Transfer of Stock." The Act governs certificates issued after July 1, 1910.

CHAPTER IX.

THE STATUS OF A MEMBER.

§ 57. **When created and terminated.** Where there is a capital stock, the owner of a share is, for the time of such ownership, a member of the corporation. The share comes into existence by a subscription contract; it is property and membership is its attribute. For the full enjoyment of his rights an assignee must have the share transferred into his name on the corporate books,—because, for most purposes, the company is entitled to treat the registered holder as the real owner; but recording the transfer is a matter of duty and not of grace on the part of the corporation. And the status continues so long as the member has the desire or the financial ability to hold on to the share. On the other hand, where there is no capital stock, membership depends upon election; it is not transferable as of right[1] and may be terminated by expulsion for good cause.

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[1] There are, of course, membership corporations such as mutual insurance companies in which the feature of election is more or less attenuated. The fact that membership involves a property right does not make it transferable. See *Commission Co. v. Exchange,* 143 Ill. 210, and the notes to the same case in 18 L. R. A. 191. Membership in a stock exchange is property within the meaning of the bankruptcy act—*Page v. Edmunds,* 187 U. S. 596; but it is not subject to taxation—*Baltimore v. Johnson,* 96 Md. 737; or execution—*Lowenberg v. Greenbaum,* 21 L. R. A. 399.

§ 58. **Rights and duties of a member.** The personal element which may characterize membership in a corporation having no capital stock as distinguished from shareholding, accounts for the difference in the legal positions. Where a social or co-operative element exists, the member owes to the body a reasonable degree of loyalty; and to his fellow members a reasonable degree of good conduct. For misbehavior he may, after a fair hearing, be expelled. The standard of conduct will, of course, vary with the nature of the corporation, and a distinction is drawn between those owning property and those having none. In the former case it is said that there is no inherent power of expulsion, and that the right does not exist unless conferred by charter or by by-laws to which the member has subscribed.[1] On the other hand there is no personal element in the relation of a shareholder to his company; he is not its agent; there is no fiduciary relation between him and it; and he may at

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[1] See the opinion and note in *Burt v. Union League,* as reported in 8 L. R. A. 195; and for the conflict of authorities, Am. & Eng. Ency., 2nd Ed. Vol. 9, p. 477—"Disfranchisement." In *Anacosta Tribe v. Murbach,* 13 Md. 91, a by-law which provided for expulsion was sustained; and see *Osceola Tribe v. Schmidt,* 57 Md. 98. Courts will not entertain the complaints of a member where the by-laws provide for their submission to and final determination by a tribunal within the organization. See cases just cited and *Donnelly v. Supreme Council,* 106 Md. 425. But the facts must show an opportunity for a hearing and for a fair hearing. *Council v. Littleton,* 100 Md. 416, and *Dague v. Grand Lodge,* 111 Md. 104. There is an exhaustive note on the subject to the case of *Ryan v. Cudahy,* 40 L. R. A. 353. The technical term for the expulsion of a member is "disfranchisement"; and the removal of a member of the governing body is "amotion." For the distinction, see the curious case of *James Bagg,* 11 Rep. (Coke) 93.

all times vote his shares for his own interest.[1] In normal course, a shareholder's rights are those which he exercises, as part of the majority in corporate meetings, in electing directors and adopting by-laws for their governance. But outside of corporate meetings his activity is limited to cases in which his property rights as shareholder are affected. The following are points for notice: 1st. In order to preserve his proportionate control, a stockholder is, in the absence of special conditions, entitled to take his share of increased stock.[2] 2nd. "A stockholder, though owning but a single share, may invoke and set in motion the plenary and far-reaching powers of a court of equity to investigate, strike down and strip of its covering any act of the corporation to which he belongs, when that act is tainted with fraud, or is *ultra vires* or illegal."[3] 3rd. Statutes usually confer some rights upon minority shareholders, and those contained in the Maryland general law are substantially the following: (a) The Act of 1910, relating to banks and

[1] *Shaw v. Davis*, 78 Md. 308. Herein a shareholder differs from a director. In *Beatty v. Transportation Co.*, L. R. 12, App. Cas. 598, a shareholder was allowed to vote his shares in favor of ratifying a contract which he had made with the corporation as a director; see also, *Hodge v. Steel Co.*, as reported, with briefs of counsel, in 60 L. R. A. 742.

[2] *Railroad Co. v. Hambleton*, 77 Md. 341; *Real Estate Co. v. Bird*, 90 Md. 229; *post*, Chap. XIV.

[3] *Du Puy v. Terminal Co.*, 82 Md. 426; *Bond v. Gray Imp. Co.*, 102 Md. 426; *Shaw v. Davis*, 78 Md. 308. It must be remembered, however, that the right to sue for injury to the corporation belongs primarily to it; and the shareholder can maintain no action unless he shows: (1) That the transaction complained of is not within the powers of the majority or is otherwise unlawful; (2) that he has made demand upon those in control to take action; or (3) that they are acting collusively and an appeal to them would be useless. *Hawes v. Oakland*, 104 U. S. 450; *Davis v. Gemmell*, 70 Md. 356.

trust companies (Code 1911, Art. 11, sec. 76), vests in a single shareholder the right of canvassing the votes at all corporate meetings.[1] (b) The owners of five per cent. or more of the outstanding capital stock, or of any class, if two or more classes have been issued, may by written request obtain a sworn statement of the corporate affairs, comprising a particular account of its assets and liabilities in detail,—which must be placed on file at the principal office of the corporation within twenty days after demand, and remain open during business hours to the inspection of any stockholder,—who may copy the same.[2] (c) Prior to the revision of 1908, it was the right of any stockholder to demand a personal inspection of the books at any reasonable time (*Weihenmayer v. Bitner,* 88 Md. 331). The present law limits this right to any person or persons holding in the aggregate five per cent. of the capital stock, or of any class thereof if two or more classes have been issued.[3] In a proper case, a writ of mandamus will issue to compel the inspection; but the writ will not be granted if the application is not made in good faith.[4] (d) In the case of consolidation, or the sale, lease or exchange of the corporate property as an entirety, a dissenting stockholder is entitled to have his shares valued and paid for.[5]

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[1] Useless, and probably the result of indiscriminate copying; see *ante,* p. 90, note 3.

[2] Code (1911), Art. 23, sec. 72.

[3] The former law is reproduced in the Act of 1910 relating to banks and trust companies. See Code (1911), Art. 11, sec. 53.

[4] *Wright v. Heublein,* 111 Md. 657. In *Guthrie v. Harkness,* 199 U. S. 148, the right of inspection is declared to be a common law right; and a mandamus issued by a state court to the directors of a national bank was upheld. In *McClintock v. Young Republicans,* 210 Pa. 115, 68 L. R. A. 459, it was held that the right of inspection belongs to a member of a corporation having no capital stock.

[5] Code (1911), Art. 23, secs. 31 and 32.

CHAPTER X.

DIRECTORS.

§ 59. **Qualification.** Directors, managers or trustees, are names indifferently applied to the board in which the administrative powers of a corporation are primarily vested. In the absence of some statutory provision, any person may be a director who is qualified to act as the agent of another. Share ownership is not necessary, nor is residence in the state of the domicil. Statutes, however, sometimes impose conditions, e. g. share ownership; the only condition in the general law of Maryland is that at least one of the directors must be a citizen of and actually reside in this State.[1]

§ 60. **Election.** Subject to any special provision in the charter or governing statute, the time and manner of electing directors is within the control of the shareholders or members and subject to the by-laws adopted by them. Statutes usually provide (and such seems to be the common law rule) that directors hold over until their successors are

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[1] Code (1911), Art. 23, sec. 8. Under the national banking act a director must own at least ten shares; and in Art. 11 of the Code, which deals with state banks and trust companies, there are special and foolish qualifications, e. g. sec. 50.

duly chosen and qualified.[1] Courts of equity have no authority to determine the validity of a corporate election; they have no power to remove directors fraudulently chosen or to prohibit them from exercising the powers of their office. Where the proceedings have been illegally conducted, the persons rightfully elected may, by writ of mandamus, be put in control.[2] A director may resign, whenever he so pleases.[3]

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[1] The Maryland statutory provisions, which are subject to variations of detail in the case of a few particular classes of corporations, are found in Code (1911), Art. 23, secs. 3, 8 to 12, and 16. The board for the first year consists of the persons named as such in the certificate of incorporation, subject, however, to the right of the stockholders, by a by-law, to increase or decrease the number; and, by action taken at a special meeting, to remove any director from office. After the first year the members of the board are elected at the annual meetings. By a by-law, the directors may be divided into classes and the terms of office of the several classes prescribed; but no class may be elected for a shorter period than one year or for a greater period than five; and the term of office of at least one class must expire in each year. Vacancies in the board are filled as the by-laws provide; and in the absence of any provision they may be filled by the remaining members of the board.

[2] But, nevertheless, equity can grant *preventive relief*. Compare: *Supreme Lodge v. Simering*, 88 Md. 276; *Triesler v. Wilson*, 89 Md. 169; and *Pope v. Whitridge*, 110 Md. 468 and 486.

[3] "A resignation of a bank director orally made to the president is sufficient when it is made on the sale of his shares of the stock." *Briggs v. Spaulding*, 141 U. S. 132. This result would naturally follow because ownership of shares is one of the qualifications of a director in a national bank imposed by the Act of Congress. But in the same case, the general doctrine on the subject is stated as follows: "Putting a resignation in writing is the more orderly and proper mode of procedure, but if the fact exists and is adequately proven, the result is necessarily the same as applied to this case. We do not understand that because sec. 5145, Rev. Stat. provides

§ 61. **Directors de facto.** Those who are actually holding the office and exercising its functions, are for all purposes of corporate dealings the representatives of the corporation and their acts are as valid as those of directors *de jure*. Persons dealing with a corporation are under no obligation to inquire into the regularity of elections.[1]

§ 62. **Voting.** Being merely agents and not the corporate entity itself, directors may hold their meetings outside the boundaries of the creating state. A director must vote in person and not by proxy; he has but one vote, irrespective of the number of shares that he may hold; he is entitled to reasonable notice of board meetings; and, in the absence of special provisions, a majority of a full board must be present to constitute a meeting. The presiding officer has the right to vote, and is not restricted to a casting vote in case of a tie.[2]

§ 63. **Compensation.** In the absence of an express agreement made or authorized by the stockholders, a

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that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the Banking Law is silent as to the time when, and the method by which, the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective." Compare *The Regents' Case*, 9 G. & J. 365.

[1] *Burgess v. Pue*, 2 Gill, 254. And see the note to *Waterman v. Railroad Co.*, 15 L. R. A. 418.

[2] Compare *McCullough v. Railroad Co.*, 4 Gill 58; and see generally for an excellent detailed treatment, Machen Corporations, Chap. 24. For the general law of Maryland, see Code (1911), Art. 23, sec. 8; note, as to quorums, peculiar provisions for state banks and trust companies in Art. 11, secs. 26 and 50.

director is not entitled to be paid for his services as such. If he renders services which are not fairly within the scope of his official duty, he may recover compensation upon an express or an implied promise, as the case may be.[1]

§ 64. **Agency.** It has been previously stated that a director, by virtue merely of his directorship, does not represent the corporation in its business dealings. The board acts as a unit, and the function of a director as such is limited to participation in the action of the board. As a consequence of the rule, a corporation is not chargeable with notice of facts not officially known to a director and not communicated to the board.[2]

§ 65. **Duties.** The relation of a director to his corporation, looked at from the point of view of his duty toward it,—has been variously described in terms of trust and of agency. But these terms are descriptive rather than defining.[3] There are, of course, many limitations upon trustees and agents to which a director is not subject, but the essential principles in the comparison seem to be these: (1) in dealing with the corporate rights and property, the governing rule applies that "he who undertakes in any matter to act for another cannot in the same matter act for himself"; and (2) moreover, and irrespective of any conflict between his own interest and that of the corporation, it is the duty

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[1] *Santa Clara Co. v. Meredith*, 49 Md. 389; *Corrine Mill Co. v. Toponce*, 152 U. S. 405. Compare: *Francis v. Brigham-Hopkins Co.*, 108 Md. 233.

[2] For the case of notice to a director, who is also an official or agent, see *post*, § 69. By Code (1911), Art. 23, sec. 87, a director is made an agent for the service of process.

[3] *Shaw v. Davis*, 78 Md. 318; with which compare *Hoffman Coal Co. v. Cumberland Coal Co.*, 16 Md. 463; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Cumberland Coal Co. v. Parish*, 42 Md. 599.

of a director to direct. These principles are assumed in all the discussions: difficulties sometimes arise in the application. The following are illustrations:[1]

First. Suppose a director is buying from or selling to his corporation. If the transaction is made with, or authorized or duly ratified by the stockholders, the transaction will stand, even though the shares of the director so buying or selling are voted in favor of the transaction and even though the result depends upon the votes of his shares.[2] If the transaction is between the director and the board, then, by the weight of authority, the transaction is voidable at the instance of the stockholders, entirely irrespective of its fairness. Some of the decisions distinguish between cases in which the action of the board depends upon the vote of the director so dealing, and cases in which he does not participate in such action. And even where the transaction is voidable, it may be ratified by the stockholders with full knowledge of the facts; and in a strong case, acquiescence may amount to ratification. Of course, actual fraud will affect the result in any case. The fact that two corporations have common directors, does not of itself invalidate a transaction between them.[3]

Second. The duty of a director to direct has been interpreted in two ways. In one view, it is said that directors must exercise "the same degree of care and prudence that men prompted by self interest generally exercise in their own affairs under like circumstances"; and that "it is not

[1] See Machen: Corporations, Chap. 26; *Acker v. McGaw*, 106 Md. 536.

[2] *Hodge v. United States Steel Co.*, 60 L. R. A. 742. See also *Urner v. Sollenberger*, 89 Md. 316, and generally, Machen: Corporations, sec. 1592.

[3] *Booth v. Robinson*, 55 Md. 419; *Shaw v. Davis*, 78 Md. 318; *Francis v. Brigham-Hopkins Co.*, 108 Md. 233.

enough that they employ agents of good character and skill; their acts must be watched and scrutinized with such vigilance as a discreet business man would exercise over his own affairs." *Fisher v. Parr,* 92 Md. 265-266. In the other view, it is held that reasonable care means the absence of gross negligence; that the standard of care varies with the nature of the corporation and the manner in which the business of similar corporations is usually conducted; and that knowledge of what the books and papers of the corporation would show "cannot be imputed to a director for the purpose of charging him with a liability."[1]

Third. For breach of duty in discharging their functions, directors are responsible to the corporate body, and not to the individual shareholders nor to the creditors. Where the board refuses to act, a shareholder may institute in his own name a suit for the benefit and protection of the corporation; and sometimes, as will presently be noted, statutes impose upon directors a liability in favor of creditors. But in no case has a shareholder any individual right of action against the directors for the depreciation in value of his shares caused by their neglect or misconduct, *Smith*

[1] *Briggs v. Spaulding,* 141 U. S. 132. In this case, as in *Fisher v. Parr, supra,* there was a heavy dissent. Spaulding was a director in a national bank which had been looted by the executive officers. "In his opinion, if the directors imposed upon the executive officers the duty of conducting its business, the duties of the directors would thereafter become nominal." His opinion was apparently shared by the majority of the court. The two cases differ further in this: In *Fisher v. Parr,* it is held that the liability for negligence rests presumptively on the whole board, and that any member who can do so must exculpate himself. In *Briggs v. Spaulding,* it is said that the plaintiff must prove the negligence of any director sought to be held. See, on this point, the dissenting opinion in *Fisher v. Parr;* and *Carrington v. Baashor,* 118 Md. 419.

v. Hurd, 12 Met. 371; nor in the absence of statute has a creditor any such remedy for the loss of his debt. The liability, if any, is between the directors and the corporation or its representative; the measure of damage is the loss to the corporation which reasonable care would have prevented; and the equities of the shareholders and creditors must be worked out through the corporate entity.

Fourth. It is sometimes said that as to the corporate assets, the directors are trustees for the creditors. This is not true except in a very limited sense. When the directors see that the business has got to stop, they have no right, being creditors, to pay themselves and let the other creditors take what is left. *Clark Co. v. Colton,* 91 Md. 195. But until proceedings in insolvency, voluntary or involuntary, have been instituted or some act that in law is regarded as an act of insolvency has been committed, the corporation holds its property "free from the touch of a creditor who has acquired no lien." *Hollins v. Briarfield Co.,* 150 U. S. 383; *Fear v. Bartlett,* 81 Md. 444.[1]

§ 66. **Statutory liability.** Statutes passed in the interest of creditors frequently prohibit or require certain action on the part of the directors and penalties are prescribed for disobedience. Failing to file reports, filing false reports, lending money to shareholders, paying dividends

[1] In Maryland there is the following statutory provision: "Upon the dissolution of any corporation otherwise than by judicial proceedings, and until other persons shall be appointed receivers by some court of competent jurisdiction, the directors at the time of dissolution shall become and be trustees for the creditors, stockholders and members of the corporation so dissolved * * * and the said trustees shall be jointly and severally liable to the creditors, stockholders and members of such corporation to the extent of its property and effects that shall come into their hands." Code (1911), Art. 23, sec. 80.

out of capital,—these are some of the things that directors are punished by statute for doing or not doing. Concerning all such provisions there are two observations to be made and afterwards will be taken up the special requirements of the general incorporation law of Maryland.

First. In the prevailing view such statutes are penal and will not be enforced by courts other than those of the state where the statute operates. But there is high authority to the contrary. In *Bank v. Price,* 33 Md. 491, the appellee was a director in a corporation of Pennsylvania and by a statute of that State the directors were liable to creditors for all debts contracted in excess of the capital stock. The appellant, a creditor of the corporation, was held to have no right of action enforceable in Maryland against the appellee. In *Attrill v. Huntington,* 70 Md. 191, there was a statute of New York which imposed upon the directors of corporations of that State a penalty for filing false reports of assets and liabilities. Huntington had obtained judgment under the statute against Attrill in New York and a suit based on the judgment was brought in Maryland, for the purpose of setting aside as fraudulent, certain transfers of property made by Attrill to his wife. A majority of the court applied the rule in *Bank v. Price, supra,* and held that the rule was not affected by the fact that the suit was on the judgment and not on the statute. The Supreme Court of the United States reversed the judgment of the Maryland court on the ground that it did not give full faith and credit, as the Constitution requires, to the judgment of the court of New York; and it was held, moreover, that the New York statute was not penal within the rule which excepts penal statutes from the principle of interstate comity.[1]

[1] *Huntington v. Attrill,* 146 U. S. 657. The Chief Justice dissented on the ground that there was no federal question involved and that

Second. Such statutes confer no right of action on the corporation or its receiver; but in a suit against the directors by the corporation or its representative for negligence in the discharge of their duties, the statutory provisions may furnish "the standard of duty and the evidence of wrong doing. But the penalty of the statute is not recoverable in such a suit."[1]

Third. The liabilities imposed by the general law of Maryland upon directors of corporations are these:

"First. If the trustees, managers or directors of any such corporation shall declare and pay any dividend when the corporation is insolvent, or any dividend, the payment of which would render it insolvent, or would diminish the amount of the capital stock, they shall be jointly and severally liable to the extent of the dividends so declared and paid for all the debts of the corporation then existing, and also for all that shall thereafter be contracted, while they shall respectively continue in office, even although the whole amount of the capital of said corporation has been paid in. But if any of the trustees, directors or managers of said corporation shall object to declaring such dividend, or to

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the decision of the Maryland court as to the penal nature of the New York statute was conclusive. The questionable view of the Supreme Court, namely, that a penal statute must be criminal or *quasi* criminal in its nature, was that taken in the dissenting opinion in the Maryland Court; and also in *Huntington v. Attrill*, L. R. 18 App. Cases 150, a case on the same judgment, decided by the Privy Council on appeal from Canada.

[1] *Fisher v. Parr*, 92 Md. 278; and *Briggs v. Spaulding*, 141 U. S. 132. On this point the two cases are in accord. By Code (1911), Art. 23, sec. 75, it is now provided that the liability of the directors thereby imposed "shall be collectible by the receiver or other person winding up its affairs, as an asset of the corporation." The whole section is presently quoted.

the payment of the same, and shall, at any time before the time fixed for the payment of the same, record a certificate of their objection in writing with the clerk of the court in which the certificate of incorporation is recorded, they shall be exempt from the liability imposed hereby.

Second. No loan of money shall be made by any corporation to any stockholder or director therein and if any such loan shall be made, the officer or officers or directors who shall make it or assent thereto shall be jointly and severally liable for all the debts of said corporation to the extent of the loss that may result from such loan; but this paragraph second shall not apply to any building or homestead association, or any corporation whose principal business under its charter is to loan money on real or personal property, or to any corporation receiving and authorized to receive money on deposit or to any life insurance company lending money to any of its policy holders on their policies.

Third. In the event of the insolvency of the corporation, the liability of the directors and officers under this section shall be collectible by the receiver or other person winding up its affairs, as an asset of said corporation."[1]

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[1] Code (1911), Art. 23, sec. 75. In the case of national banks, the duties and liabilities imposed by the banking act control any inconsistent state provisions. *Yates v. Jones National Bank*, 206 U. S. 158. For the jurisdiction of equity, the bar of limitations, and the nature of the liability in suits by receivers against directors, see *Emerson v. Gaither*, 103 Md. 564; *Murphy v. Penniman*, 105 Md. 452; *Gaither v. Bauernschmidt*, 108 Md. 1; *Fouts v. Miller*, 112 Md. 458. Notwithstanding the statute, a director who votes for a dividend which is unwarranted, would hardly be liable unless he acts knowingly or negligently. Compare *McDonald v. Williams*, 174 U. S. 397; and Code (1911), Art. 11, secs. 65-68.

CHAPTER XI.

OFFICERS AND AGENTS.

§ 67. **How elected and appointed.** Subject to the provisions of the charter and the will of the shareholders as embodied in the by-laws,[1] directors may parcel out their administrative powers by electing and appointing such officers and agents as the needs of the corporation require. In usual course the board organizes by electing a president to preside over its meetings; a vice-president, who, in the absence of the president, takes his place; a secretary, who keeps the records and is the custodian of the corporate seal; and a treasurer, who acts as the chief financial officer. But subject to the charter and any governing statute, the number, the names and the duties of the officers are matters in the discretion of the corporation. In the nature of things there must be a presiding officer who, with his substitute, must be members of the board; but neither the secretary nor the treasurer need be; and two offices not inconsistent may be filled by the same person.[2]

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[1] The will of the members expressed in an invalid by-law does not bind the directors. *Insurance Co. v. Farquhar*, 86 Md. 668.

[2] Code (1911), Art. 23, secs. 9 and 10, provides:

"Every corporation subject to the provisions of this article shall have a president, a secretary, a treasurer and, if the by-laws so pro-

§ 68. **Authority.** The officers of a corporation are, of course, its agents; they differ from directors, on the one hand, in that these, by custom, are specially so designated; and from agents and servants generally, in that these fill no recognized office in the organization. Like the agents of a natural person, the powers of corporate officers strictly depend upon the authority the principal has given them or has held them out as possessing. In the matter of express powers there is nothing in the law of agency peculiar to corporations. Executive powers, for example, may be conferred by the board upon the president; or upon the managing director; or upon a general manager who is not a director; or, as is sometimes done in the case of banks, upon the cashier; or the powers may be vested in an executive committee of the board. And whatever any officer or agent of the corporation, high or low, has been authorized to do; and whatever he has, with the knowledge of the board, been in the habit of doing,—in such and similar matters, the cor-

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vide, one or more vice-presidents—all of whom shall be chosen by the directors unless the by-laws otherwise provide. The president and at least one of the vice-presidents shall be chosen from among the directors; the treasurer and the secretary need not be directors; and any two officers (offices) except those of president and vice-president, may be filled by the same person."

"The board of directors may exercise all of the powers of the corporation, except such as are by law or by the certificate of incorporation or by the by-laws conferred upon or reserved to the shareholders or members. The by-laws may provide for an executive committee of two or more members to be elected from and by its board of directors; and to such committee may be delegated the management of the current and ordinary business of the corporation and such other duties as the by-laws may prescribe."

poration will be bound.[1] But questions of difficulty arise over *ex officio* powers; and these questions are more or less peculiar to corporation law. If you are dealing with the president, or cashier, or the transfer agent, what is the authority which the corporation holds these officers out as possessing, by reason merely of their incumbency of the office? In *Bank v. Armstrong,* 152 U. S. 346, for illustration, it is said that the vice-president of a national bank, however general his powers, cannot borrow money for the bank unless specially authorized to do so; "and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."[2] What are these general powers which the law presumes that you know? No concise answer is possible for the reason that much depends upon the nature of the corporation and its business; and because, further, there is a conflict of decision in regard to corporations of similar nature. The following are general principles:

First. The inherent, *ex officio* business powers of the president, vice president and secretary are few. These offices are not necessarily executive; and it is sometimes said that the president has, officially, no more executive power than any other director, except that he and the secretary are the proper officers to sign the corporate name and affix the seal to documents previously authorized by the board. Accordingly, it has been held that the president and secretary have no inherent power to issue negotiable paper in the name of the corporation. *R. R. Co. v. Bank,* 31 L. R.

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[1] *Carrington v. Turner,* 101 Md. 438; *Buchwald Co. v. Hurst,* 111 Md. 578.

[2] Compare: *Anton v. Bank,* 174 U. S. 125; and *Aldrich v. Bank,* 176 U. S. 618. The secretary has no presumptive authority to appoint agents or to ratify appointments made without authority. *Carroll v. Manganese Co.,* 111 Md. 252.

A. 535. But while, presumptively, the president is nothing more than the presiding officer of the board and his further powers are derivative,—nevertheless the authority to do a particular act may always be inferred from the acquiescence of the board in his prior performance of similar acts. And in the case of business corporations, the courts are not slow to draw the inference.[1]

Second. Such offices as general manager, treasurer and cashier are essentially executive and the incumbent has implied powers commensurate in scope with the business entrusted to him. Those of a general manager, for example, are co-extensive with the company's business; he may borrow money and accept bills in usual course;[2] he may make contracts, but he has no implied authority to change a contract made by the board.[3] So with regard to the other officers and customary agents, the implied power is co-extensive with the duties customarily pertaining to the office; and the conflict of judicial opinion is not over the principle, but in its application to the facts of a particular case. For illustration, in manufacturing and trading companies the treasurer has the inherent power to issue negotiable paper; but in *Bank v. Citizens' Co.*, 159 Mass. 505, the judges differed as to whether this principle should be applied to a gas light company.[4]

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[1] For a valuable note on the powers of the president and vice-president, see *Wait v. Nashua Armory Asso.* 14 L. R. A. 356; *Elliott, Corp.* sec. 529. Compare *R. R. Co. v. Bastian,* 15 Md. 499.

[2] 7 Thompson Corp. sec. 8556; and compare *Equitable Co. v. Fisher,* 71 Md. 439.

[3] *Merritt v. Peninsular Co.*, 91 Md. 453.. See *Express Co. v. Trego,* 35 Md. 47.

[4] For a general collection of the cases on the inherent powers of officers and agents, see 21 Am. & Eng. Ency. 833; 1 Wilgus Corp.

Third. It makes no difference to third parties acting in good faith that an officer or customary agent is using the authority of his position dishonestly. If he is the proper person to do the particular act when it is regularly done, the corporation will be bound. In *Tome v. R. R. Co.*, 39 Md. 36, there was a by-law providing that all certificates of shares should be signed by the president and countersigned and sealed with the corporate seal by the treasurer, who was made the transfer agent and the custodian of all the books relating to the transfer of capital stock. It was, consequently, the duty of the treasurer to see to the transfers of shares on the corporate books and to issue new certificates to persons entitled. The book of certificates contained a number that had been signed by the president in blank. Using these and forging the president's name to others, the treasurer issued certificates to a confederate, who borrowed money from the appellant on the security of the shares. The court held that the company was liable for the appellant's loss on the shares evidenced by all the certificates,—two of the judges dissenting as to the forgeries.[1]

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704. Machen, Corp. §1668, &c. The decisions turn upon whether a particular act is within the scope of the office; and the lesson taught by them is the wisdom of having a resolution of the board in all cases of doubt and importance. The question of the time for which contracts of employment may be made in behalf of a corporation by its officers, directors and agents, is discussed in the note to *Carney v. Insurance Co.*, 49 L. R. A. 471. In that case the president and the actuary of an insurance company acting under a by-law which authorized them to appoint and remove employees, had made a life contract with a doctor. It was held that the contract was unreasonable and beyond the powers of the officers making it. See also *West v. Camden*, 135 U. S. 507.

[1] In *R. R. Co. v. Wilkens*, 44 Md. 11, a station agent had issued to himself bills of lading for grain which he did not ship. The

In *R. R. Co. v. Franklin Bank,* 60 Md., 36, certain certificates used by the appellant in funding its overdue mortgage coupons and issued to the holders of such coupons desiring to fund them, had been signed by the president and treasurer of the company, sealed with its seal and left with the assistant treasurer, to be filled up and used during an anticipated absence from the office, of the first named officers. As part of the funding scheme, the coupons were to be deposited with the Safe Deposit and Trust Company, and the receipt of its treasurer attached to the certificate when returned to the holder. The certificates, with the receipt attached, were regularly dealt in on the market and the appellee loaned money on certain of them which the assistant treasurer had issued to himself,—having forged to the receipt the name of the treasurer of the Safe Deposit and Trust Company. Applying the rule in *Tome's Case, supra,* the Railroad Company was held liable.

Fourth. It has been stated above that the fraudulent and dishonest conduct of an officer or agent in the exercise of his apparent powers does not affect third parties acting in good faith. There is, however, some difficulty in laying

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appellee had cashed in good faith, a draft drawn against the bill of lading. The court held that the company was not bound, on the ground that to the rule in *Tome's Case* "there is and must be the exception of the recognized and well settled principle of commercial law in reference to bills of lading." By the subsequent Act of 1876, certain kinds of bills of lading were made negotiable instruments. In *Lazard v. Transportation Co.* 78 Md. 3, the rule in *R. R. Co. v. Wilkens, supra,* was applied, because the bills of lading in question did not come within the provisions of the Act. See further: *Bank v. B. & O. R. Co.,* 99 Md. 662; and *Bank v. Steamboat Co.,* 102 Md. 575. The whole subject is now governed by the Uniform Bill of Lading Act, Code (1911), Art. 14.

down a rule which shall determine just how far the appearances of a particular transaction operate to put third parties upon inquiry. In *R. R. Co. v. Franklin Bank, supra,* two of the certificates were made out in the name of the forger himself and were by him pledged to the bank, which had knowledge of the nature and scope of his employment. It was held that these facts were not sufficient to put the bank on inquiry or to deprive it of the rights of a *bona fide* purchaser without notice. In *Moores v. Bank,* 111 U. S. 156, the appellant had loaned money to her brother-in-law, the cashier of a national bank, on his agreement to give her, as security for repayment, certain shares in the bank which he represented that he owned. In point of fact, he owned no shares, but the appellant received a share certificate made out in her name in due form. It bore the genuine seal of the corporation and the genuine signatures of the president and cashier,—the latter having filled up one of several certificates which the president had signed in blank to be used, if needed, in his absence. It was held that the appellant's knowledge of the fact that the cashier was acting for himself as well as in his official capacity, in the transaction requiring the issue of the certificate, was sufficient to put her on inquiry and that she could not claim the rights of an innocent holder.[1]

§ 69. **When notice to an officer or agent is notice to the corporation.** When a corporate agent is duly author-

[1] The court distinguishes *R. R. Co. v. Bank,* 60 Md. 36, but not happily. Mrs. Moores had no knowledge of the rascality of her brother-in-law; as cashier of the bank, he would naturally have been a shareholder; and the transaction on its face was precisely what it would have been had he actually owned the shares. In such a case, it is a sound rule which makes the corporation warrant its officer's honesty.

ized to act in any particular transaction, the knowledge acquired in that transaction is imputed to the corporation under the ordinary rule that notice to an agent is notice to the principal. But where an officer is acting not for the corporation, but in his own behalf, or where the information is acquired unofficially and not communicated to the board, the corporation will not be bound. In *Winchester v. R. R. Co.*, 4 Md. 232, the president of the appellee executed to certain of its directors, a mortgage of land in which his wife had an equitable claim by virtue of an unrecorded deed to her. It was held that his knowledge of his wife's equities was not the knowledge of the corporation. In *American Surety Co. v. Pauly*, 170 U. S. 133, the president of a bank had made representations to a surety company concerning the honesty of a cashier who had applied for a bond. The cashier was a defaulter and the president knew it,—the certificate having been given in pursuance of a scheme between him and the cashier to defraud the bank. It was held that the knowledge of the president respecting the cashier's defalcations was not the knowledge of the corporation.

In *Black v. Bank of Westminster*, 96 Md. 399, the question was whether the appellee could be charged with the knowledge of its president that the appellant's note discounted by it had been issued conditionally. It was said that "the sound and safe rule on this subject is that notice given to a director of an incorporated institution privately, or which he acquires from rumor or through channels open alike to all and which he does not communicate to his associates at the board will not bind the institution."[1]

[1] It is submitted, however, that this rule would not apply if the president had been the authorized agent of the bank to discount the

§ 70. **De facto officers.** All that has been said of the inherent *ex officio* powers of corporate officers applies to the incumbent of the office, whether or not he is an officer *de jure*. "Officers *de facto,* holding under color of an election, having charge of the affairs of a company, are capable of binding it in all matters legitimately devolving upon directors of the company." *Mining Co. v. Bank,* 104 U. S. 192; *Burgess v. Pue,* 2 Gill, 254.

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note and had acquired the knowledge in that transaction. See *Schwind v. Boyce,* 94 Md. 510; and *Maryland Trust Co. v. Mechanics Bank,* 102 Md. 630.

PART V.

CONSEQUENCES OF UNAUTHORIZED ACTS.

CHAPTER XII.

CONSEQUENCES OF UNAUTHORIZED ACTS NOT TORTS.

§ 71. **Scope of the chapter.** An act done on behalf of a corporation is, in the last analysis, the act of some natural person; and whether the transaction be a conveyance, a contract or a tort, the question always is whether the particular agent had authority to bind the corporation therein. Postponing the subject of torts, which has had a curious and peculiar development, it may be said that an act intended to create a corporate obligation may fail of its object for one or more of four reasons: 1st. There may be no legally existing body corporate to be bound. 2nd. The act may be within the capacity of the corporation, but in excess of the authority of the performing agent. 3rd. The transaction may be within the corporate powers, but the power may have been irregularly exercised. 4th. The transaction may be beyond the powers of the corporation. Enough has been said concerning the consequences of the acts of a pretended corporation and concerning those which are merely in excess of the authority conferred upon the performing agent. There remain to be considered (1) transactions which are beyond the powers of the corporation,—*ultra vires,* as they are commonly called; and (2) those which

involve the irregular exercise or abuse of granted powers.

§ 72. **Ultra vires acts.** A transaction is beyond the powers of a corporation: 1st. If it is forbidden by the charter or by some governing statute,—for example, a company authorized to act as trustee or executor may be prohibited from giving surety bonds.[1] 2nd. The transaction may be forbidden by some statute or by some rule of public policy that is applicable to natural and to artificial persons alike; contracts for usurious interest[2] and lobbying contracts are illegal, whether the person concerned is a corporation or an individual. 3rd. The transaction may be beyond the powers of the corporation simply because it is foreign to the purposes expressed or implied in the charter; it may involve the exercise of a power not forbidden but simply ungranted,—as for example, where a railroad company undertakes to guarantee the expenses of a public festival.[3] In the better usage, the term *ultra vires* is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal because forbidden, and those which are simply in excess of the granted powers.[4] By other courts, particularly by the Supreme Court of the United States, this distinction is not taken, and all acts beyond the capacity of the corporation are indifferently called *ultra vires* or illegal. This confusion of terminology

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[1] Code 1911, Art. 23, sec. 381.

[2] In *Citizens Land Co. v. Uhler*, 48 Md. 455, it is held that an act permitting building associations to charge more than six per cent. interest is class legislation and unconstitutional.

[3] *Davis v. Railroad Co.*, 131 Mass. 258.

[4] *Hospital v. Foreman*, 29 Md. 31; *Western Maryland Railroad Co. v. Blue Ridge Hotel Co.*, 102 Md. 326; *Maryland Trust Co. v. Mechanics Bank*, 102 Md. 614; *Burke v. Smith*, 111 Md. 624.

causes some difficulty, but it is only incidental to the greater difficulties which result from radical differences in the attitude of the courts toward unauthorized transactions generally,—whether you call them illegal or *ultra vires*. The result is a conflict of opinion difficult to understand and more difficult to summarize. Taking for illustration two concrete cases: Suppose that a statute forbids any corporation not expressly chartered for banking purposes to exercise banking powers; and that, in violation of the statute, it exercises a banking power,—namely, the discounting of a note; and suppose further, that when sued upon the note the borrower sets up the defense of *ultra vires*.[1] Suppose again, that its charter authorized a corporation to insure property against loss by fire and that in excess of its granted powers, it receives the premium and issues a policy against damage by hailstorms; and suppose further that in a suit on the policy, the company sets up the defense of *ultra vires*.[2] In determining the legal consequences of these transactions, there are two extreme points of view which you may occupy. If you regard a corporation as endowed with special capacity only, then, theoretically, it can no more bind itself by a contract in excess of its powers, than an infant can bind himself by his contracts; and as there can be no estoppel against the disability of infancy, so there can be none where a corporate act is *ultra vires*. This conclusion is logical, just as it is logical to say that the act of a pretended corporation cannot be made good by ratification or estoppel. At the

[1] As in *German Bank v. Katz*, 57 Md. 128; with which compare *Black v. Bank*, 96 Md. 429 and *Western Maryland Railroad Co. v. Blue Ridge Hotel Co.*, 102 Md. 334.

[2] As in *Insurance Co. v. McClellan*, 9 Colo. 11.

same time, if you push the doctrine of special capacity to its legitimate conclusion and hold that an *ultra vires* contract must under all circumstances be treated as utterly void, you sometimes get results that are inconsistent with the principles of common honesty. Courts always try to do justice; but the various attempts to reconcile logic with the equities of particular cases have produced a most disorderly condition of the law. The argument in favor of the logical rule is that any other would be unjust to the shareholders, who have the right to assume that their money will not be diverted to an unauthorized use. And it is urged, that inasmuch as all charters are public records, every one dealing with a corporation is bound to know what its granted powers are. On the other hand it is said, with much common sense, that it is not reasonable to expect persons dealing with business corporations to make a prior examination of their charters; and that even judges may differ as to whether a particular transaction is within the chartered purposes. And it is further said, that since the stockholders have elected the directors, they should bear any loss resulting from an unauthorized contract made by their agents with innocent third parties.

These opposing views are embodied in what may for convenience be called respectively the strict and the estoppel doctrine. According to the former, the unauthorized contract, as such, is unenforceable always and everywhere; according to the latter, the party who has received benefits under the contract is estopped to deny its existence. But in neither theory are the outlines well defined or clearly drawn; and between them are decisions partaking of both views and marked by various degrees of inconsistency. An attempt will be made to summarize the contents of the respective

doctrines, and then an account will be given of the Maryland decisions; but by way of preface, it is important to note certain principles accepted with more or less unanimity by all the courts. 1st. The exercise of an ungranted power is an abuse of the corporate franchise and a ground for forfeiture proceedings on the part of the state.[1] 2nd. So long as the transaction is wholly executory, that is to say, if neither party has altered his position thereunder, the courts will sustain the defense of *ultra vires* to any action or proceeding based upon the contract.[2] 3d. As between the corporation and a shareholder, the latter, though owning but a single share, may maintain his bill for an injunction to restrain the performance of an *ultra vires* transaction that is yet in the executory stage.[3] 4th. Where both parties to a contract are corporations, the transaction is *ultra vires* if it is beyond the powers of either,—for example, the fact that a railroad company has, under its charter, the general power to purchase the property of any other road, does not make the sale valid if it is beyond the powers of the vendor.[4] 5th. To be available, the defense of *ultra vires* must be pleaded and proved by the person relying upon it.[5] 6th. The estop-

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[1] *Fraternal Alliance v. State,* 86 Md. 560.

[2] *Bank v. Jones,* 95 N. Y. 115,—a leading case.

[3] *Du Puy v. Terminal Co.,* 82 Md. 408. In *Tomkinson v. R. R. Co.* L. R. 35 Ch. Div. 675, the defendant had agreed to make a donation of £1,000 to the Imperial Institute, and a resolution to that effect was approved by the vote of shareholders representing ninety-nine per cent. of the capital stock. The complainant notified the directors not to make the donation, and in reply was offered 13d., which would have been his proportion of the proposed contribution. His bill for an injunction was sustained.

[4] *State v. Consolidation Coal Co.,* 46 Md. 12.

[5] 5 Thompson Corporations, sec. 5967; 10 Cyc. 1156.

pel doctrine will not be applied in favor of any party who, at the time the contract was made, had actual knowledge that it was in excess of the corporate powers.[1] 7th. Where the transaction, in addition to being beyond the granted powers, is also illegal, that is to say, contrary to public policy or expressly forbidden by some statute, or even by the provision of a particular charter, the courts, which distinguish between *ultra vires* and illegal contracts, will deal with it according to the principles which govern illegal contracts between natural persons. Unless some statute expressly declares the transaction void, it will be enforced or not, according as public policy requires; and relief not based on the illegal contract may be afforded where the parties are not *in pari delicto*.[2] 8th. Where a transaction is held void as in excess of corporate powers, the party setting up the defense must account for the net benefits received thereunder.[3]

§ 73. **The strict doctrine.** In the English view, hereafter noticed, a contract which a corporation has no power to make is no contract at all. And nothing that the parties may do or leave undone, no amount of ratification or estoppel, can give it vitality. In the view now taken by

[1] Thompson Corporations, sec. 6009.

[2] *Lester v. Bank,* 33 Md. 562; *Shoemaker v. Bank,* 31 Md. 402. The fact that a general incorporation law forbids any corporation to exercise ungranted powers does not make all *ultra vires* contracts illegal. *Curtis v. Leavitt,* 15 N. Y. 9, cited in *Hospital v. Foreman,* 29 Md. 531. The federal rule, *post,* makes all *ultra vires* acts illegal. See: *Maryland Trust Co. v. Mechanics Bank,* 102 Md. 614, and *Burke v. Smith,* 111 Md. 624.

[3] *Western Maryland Railroad Co. v. Blue Ridge Hotel Co.,* 102 Md. 331.

the Supreme Court of the United States, and by some of the state courts, the *ultra vires* transaction is illegal, but not necessarily non-existent. In *R. R. Co. v. Keokuk,* 131 U. S. 371, it is said: "The outlines of the doctrine of *ultra vires* and the reasons on which it rests, have been clearly stated in previous judgments of this court. The reasons why a corporation is not liable upon a contract *ultra vires,* that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2nd. The interest of the stockholders, that the capital stock shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock. 3rd. The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers. These three reasons are clearly brought out in the unanimous judgment of this court, delivered by Mr. Justice Campbell in the leading case of *Pearce v. R. R. Co.* 62 U. S. 441, in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steamboat received and used by it and running in connection with its railroad." Again in *McCormick v. Bank,* 165 U. S. 550: "When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter and of the general laws restricting or defining the powers of the corporation. In like manner, when the corporation is formed under general laws by the recording or filing in a public office of the required articles of association and certificate, every person dealing with the association is bound

to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers and its capacity to act as a corporation."

The doctrine of these cases is now established in the federal courts; but in earlier cases, *Ohio Company v. McCarthy,* 96 U. S. 267, for example, is to be found a statement frequently quoted by the courts which maintain the estoppel rule, namely, that "the doctrine of *ultra vires,* when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong." In the later case of *Transportation Co. v. Pullman Co.* 139 U. S. 24, however, this language is characterized as "no more than a passing remark."[1]

§ 74. **The tempering of the strict rule.** The courts which apply the federal rule limit its application as follows:

First. If both parties have done all they are to do and have gotten all they are to get; if, in other words, the *ultra vires* contract is fully executed, then the courts will not, at the suit of either party, disturb the other in the possession of what he has received.[2]

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[1] It is true that the federal decisions containing the strongest statements of the strict doctrine are those in which some public-service corporation had attempted, without authority, to abnegate its duties to the public; but none of the decisions are rested on that ground. In *De la Vergne Co. v. Savings Institution,* 175 U. S. 40, the parties to the *ultra vires* contract were two manufacturing companies. In *Bank v. Kennedy,* 167 U. S. 362, the contracting parties were banks. And in spite of the apparent precision of the present federal rule, there is difficulty in reconciling some of the applications. See the detailed and learned discussion in Machen, Corporations, secs. 1032-47.

[2] The decision in *Hospital v. Foreman,* 29 Md. 524, is *contra.* This case is dealt with in § 76, *post.* See the cases collected in 10 Cyc. 1162; 2 Machen Corp., secs. 1033, *et seq.,* and 1048 *et seq.*

Second. While the party against whom the contract is sought to be enforced may always repudiate it, and, if sued, successfully plead the defence of *ultra vires,* nevertheless, he must stand ready to return, or, failing that, make compensation for whatever has been received from the other party under the contract. To the extent that he would be unjustly enriched by repudiating, he must make restitution; but this liability does not include the damages the other party may have suffered by the breach of the contract. In *Central Transportation Co. v. Pullman Palace Car Co.,* 139 U. S. 62, the parties had been rivals in business and an agreement in the nature of a lease was entered into, whereby the appellee acquired the equipment and outstanding business of the appellant for a long term at a fixed rent. After performance for a number of years, the appellee refused to go on; and to a suit for the rent, pleaded *ultra vires.* The court held that the lease was void because it was beyond the corporate capacity of the appellant; that part performance was no good reason for requiring further performance of an unlawful act; but that the appellee must restore or account for what it had received.[1] So, where a national bank guaranteed an obligation of its debtor to secure a loan whereby the debtor got funds with which to pay the bank, an action for money had and received was held to be maintainable by the lender against the bank for so much of his money as the bank had secured under the guaranty,—notwithstanding the fact that the guaranty was *ultra vires.*[2]

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[1] In the sequel, *Pullman Co. v. Transportation Co.,* 171 U. S. 138, the court refused to allow any damages resulting from the breaking up of the appellee's business.

[2] *Citizens Bank v. Appleton.* 216 U. S. 196, affirming a decision of the New York Court of Appeals. Note that on writ of error to a

Third. The defense cannot be invoked by the party who has done all that he is to do under the contract, if the other party, who has still something to do, is willing to go on. In *St. Louis R. R. Co. v. Terre Haute R. R. Co.*, 145 U. S. 393, the appellant had conveyed its railroad and franchises to the appellee for a period of nine hundred and ninety-nine years. The lessor had delivered all the property; the lessee had regularly paid the rent and was willing to continue. A bill to have the lease set aside and cancelled and the property returned was dismissed. In the opinion, delivered by Mr. Justice Gray, the ground is taken that an *ultra vires* contract is illegal, and that inasmuch as each party must be assumed to have knowledge of the corporate powers of the other, they are *in pari delicto*. "The general rule, in equity as at law, is that *in pari delicto, potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. * * * When the parties are *in pari delicto* and the contract has been fully executed on the part of the plaintiff by the conveyance of property or by the payment of money and has not been repudiated by the defendant, it is

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state court, the Supreme Court applies the state doctrine of *ultra vires*. *Eastern B. A. v. Williamson*, 189 U. S. 129; *Sioux City Co. v. Trust Co.*, 173 U. S. 99.

now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. * * * In the case at bar, the contract by which the plaintiff conveyed its railroad and franchises to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchises to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time for seventeen years and has taken no steps to rescind or repudiate the contract. Upon this state of facts, for the reason above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. * * * This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff as upon an implied contract, for the

value of what it had received from him and had no right to retain."[1]

But an *ultra vires* contract is not fully executed if one party has done all that he has to do and the other has given a note or an obligation for the consideration. The defense may be set up in a suit on the note or obligation, subject, of course, to the liability for restitution. In *Pearce v. R. R. Co.*, 62 U. S. 441, two railroad companies had consolidated, and the president of the consolidated company gave its notes to pay for a steamboat bought to be run in connection with the roads. After the giving of the notes, the consolidation, which was unlawful, was dissolved, and at the commencement of the suit, each corporation was managing its own affairs. It was held, in the first place, that the consolidation was without authority of the law, and it was further said: "But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction.

[1] It is important to remember that the transaction which was declared to be illegal was not forbidden by statute. The ground taken by the court is that all *ultra vires* contracts are illegal, because public policy forbids the exercise by any corporation of a power not granted to it. The net result seems to be this: A transaction consummated on both sides will not be disturbed; if something remains to be done, an unwilling party will not be compelled to further performance, nor a willing party prevented. For the English doctrine, which rigorously treats the *ultra vires* act of a statutory company as non-existent, see: *Riche v. Ashbury Co.*, L. R. 7 H. L. 653. In *Osborne v. Amalgamated Society of Railway Servants*, (1910), A. C. 87, the rule was applied to a registered but unincorporated trade union.

* * * It is contended that because the steamboat was delivered to the defendants and has been converted to their use, they are responsible. It is enough to say in reply to this, that the plaintiff was not the owner of the boat nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes as indorsee; and the only question is, had the corporation the capacity to make the contract in the fulfillment of which they were executed. The opinion of the court is, that it was a departure from the business of the corporations and that their officers exceeded their authority."[1]

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[1] The plaintiff in this case was an endorsee, presumably with notice. Otherwise, the rule is that if the corporation had the power to issue the note under any circumstances or for any purpose, it will be bound, although the particular purpose was unlawful. In any case, the decision, as far as the reasons therein stated go, worked a dishonest result, if the plaintiff gave value for the note. To say that he should have known about the doctrine of *ultra vires* and its consequences, is absurd. See 4 Thompson Corporations. secs. 5737, 5378; *Heironimus v. Sweeney,* 83 Md. 160. The Code (1911), Art. 23, sec. 143, contains the following provision:

"It shall not be lawful for any land company, homestead or building association, or any association formed for the purpose of lending money, or using the corporate funds for the purpose of buying, selling, lending upon mortgage, leasing or otherwise dealing in real or leasehold estate, to issue any promissory note, bill or obligation of any kind to any member thereof, or borrow therefrom in lieu of money, and all loans by such corporation shall be made in money and not otherwise, and all notes, bills or obligations of any sort issued by any such association to or for the use or benefit of any member or borrower in lieu of money, and all deeds, mortgages or other securities whatsoever, given to secure the same, shall be void and of no force and validity whatever, either in law or equity."

The Negotiable Instruments Act (Code 1911, Art. 13, sec. 41) makes valid the endorsement of a corporation, to the extent of passing property in the instrument, notwithstanding lack of capacity.

§ 75. **The estoppel doctrine.** A modern view, which has merit, regards an *ultra vires* transaction as valid except in a proceeding by the state.[1] Most, however, of the courts which do not approve the strict doctrine apply the principle of estoppel. According to this principle neither party to the unauthorized contract may deny its existence if he has received a benefit or if the other party has incurred any detriment under it. If a transaction is illegal in the true sense of the word, that is, forbidden by positive law or by some rule of public policy applicable to all persons, then it will be treated like any other unlawful transaction; but after either party has entered upon its performance the other is estopped to allege that the contract is merely in excess of the granted powers. A single illustration will be sufficient to show the general application of the rule and the attitude of the courts which enforce it. In *Insurance Co. v. McClellan,* 9 Colo. 11, the appellant, in excess of its granted powers, had issued to the appellee a policy insuring his crops against damage by hail. The premium had been paid in the manner agreed upon between the parties; a loss occurred and in a suit on the policy the defense of *ultra vires* was set up. The court said: "The appellant company had offered to pay back the money and return or cancel the note given for the policy and counsel urgently contended that this is all that legally can and rightfully ought to be exacted. This would not place the appellee *in statu quo.* It is argued on behalf of the appellant that the courts ought in all cases to sustain the defence of *ultra vires* here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the

[1] *Farwell v. Wolf,* 96 Wis. 10; 10 Cyc. 1164.

protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits; and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defence of *ultra vires*. That the public has such an interest is quite true, but whether to afford such protection the defence of *ultra vires* is necessary in such cases, is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection is that with which these multiform corporations deal in the daily exercise of their assumed powers; and it seems illogical to assume that the interest of the public would be best subserved by a policy which will allow a corporation any more than an individual to violate the principles of common honesty and claim exemption from the obligation of its contracts, by pleading its own wrong-doing. Such policy would seem rather to offer a premium for dishonest dealing. * * * It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited, however, and when not illegal or immoral in its nature, nor contrary to sound public policy, the contract even *ultra vires* may be enforced when under the circumstances of its execution, every consideration of justice requires it. The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract. While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character.

Every one may have access to the statutes of the state affecting companies incorporated thereunder and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous."[1]

These are the broad principles upon which the estoppel rule rests; but in the application of them it must be remembered that no estoppel will be raised where there was actual, as distinguished from constructive, notice of the want of capacity.[2] Nor can there be an estoppel against one who, not being a party to the *ultra vires* transaction, has been injured by it.[3]

§ 76. **The Maryland doctrine.** It is not possible to express concisely the law of this state, because the decisions do not follow consistently either of the two rules that have been discussed. The leading cases will be taken up in

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[1] For a collection of the cases in which the estoppel doctrine is applied with more or less consistency, see 5 Thompson, Corp. sec. 6016. Singularly enough, one of the best expressions of the rule is to be found in *Bank v. Matthews,* 98 U. S. 621, where the following language of a text writer is quoted with approval: "Where it is a simple question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." The court must be taken, however, to have abandoned this position.

[2] Thompson Corp., sec. 6009.

[3] *Albert v. Bank.* 2 Md. 159.

chronological order and then an attempt will be made to summarize the results. It will be seen that with one important exception, certainly the earliest and apparently the latest position of the court is that now taken by the Supreme Court of the United States; and that the intermediate decisions take the estoppel view that the Supreme Court has adopted and abandoned. In *Steam Navigation Co. v. Dandridge,* 8 G. & J. 254 (1836), the facts were these: The appellant was incorporated for the purpose of conducting a steamboat line between Baltimore and Philadelphia. The appellee was the owner of a schooner which, with other vessels, was ice-bound in the harbor of Baltimore. The appellant entered into a contract with the appellee and the owners of other vessels, to break the ice and tow them through the tract thus broken into open water. Through the negligence of the appellant, as it was alleged, the appellee's vessel was lost, and in the suit against it, the appellant set up the defence that the contract was beyond its corporate powers. The court so held and said: "In deciding therefore whether a corporation can make a particular contract we are to consider in the first place whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose. The corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers granted, and it is confined to the sphere of action limited by the terms and intention of the

charter. According to these wise and now well established principles, the appellants had no power to bind themselves by such a contract as that attempted to be enforced against them and possessing none themselves they could not delegate any to McElderry, their agent. * * * It has been urged that the defendants having entered into this contract are estopped from denying their competency to have done so. To the doctrine of estoppel applied to such cases, we cannot yield our assent. If the corporation is estopped from denying its powers, the estoppel operates with like effect upon those who contract with them and the result would be that no matter how limited the design and powers of a corporation may appear in its charter, practically it is a corporation without limitations as to its powers." In *Albert v. Bank,* 2 Md. 159 (1852), the appellant was the beneficial owner of some public stock of the City of Baltimore which stood on its books in the name of Samuel Jones, Trustee. Jones was a director of the bank which, by its charter, was forbidden to lend its money to any director. Notwithstanding the prohibition, the bank made a loan to Jones on the security of the stock. The court held that the bank could not under the circumstances, be charged with constructive notice of the trust, but said that it was none the less liable because the transaction was *ultra vires.* "It is true, Jones might be estopped from denying the legality of the transaction, but it does not therefore follow that the rights of his *cestui que trust* are also concluded by what has been done. If what the Bank did was illegal no valid defence can be deduced from it against the party who was injured by its acts. * * * We hold that a corporation has no power to do what it is inhibited by its charter from doing and if, in violation of it, injury

should be done to the property of a third party, it is liable."[1] In *Maryland Hospital v. Foreman,* 29 Md. 524, (1868), the parties had entered into an agreement whereby for a lump sum accepted in commutation, the appellant agreed to support and care for the lunatic sister of the appellee, during the rest of her natural life. The patient died sooner than either of the parties expected and the appellee sought to recover back the commuted price less a fair and reasonable allowance for the short time, something over a year, that his sister had survived. The case was twice argued, and it was contended for the appellant that inasmuch as the contract was fully executed on both sides, the situation of the parties should not be disturbed. The court, however, drew the distinction between an illegal contract and one merely *ultra vires,* saying: "These principles are well settled and apply where the contract is in violation of some positive law or involves moral turpitude. The contract made between the appellants and the appellee is not one of that kind; it was neither *malum in se* nor *malum prohibitum;* the parties therefore cannot be said to be *in pari delicto,* for in the proper sense of the word there is no *delictum.* Here the objection which is fatal to the validity of the contract is, that the power to make it was not conferred upon the corporation by its charter, either expressly or by implication. It was simply *ultra vires* and therefore not binding upon the parties. To such a contract, the principle *in pari delicto* does not ap-

[1] In this case there was no estoppel. That the bank would have been permitted to recover from Jones, notwithstanding the prohibition of the charter made the loan illegal, see *Lester v. Bank,* 33 Md. 558.

ply; but if the party dealing with the corporation has paid money upon it, he is entitled to recover it back."[1]

In *Weckler v. Bank,* 42 Md. 582, (1875), the appellant brought suit against the appellee for the deceit practiced upon her by its teller in the sale of some railroad bonds. The court said: "We are therefore clearly of opinion that this business of selling bonds on commission is not within the scope of the powers of the corporation and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defence of *ultra vires* is open to the appellee. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant by which she was induced to purchase the bonds in question."[2]

In *Lazear v. Bank,* 52 Md. 78, (1879), the appellant was the father of the members of the firm of Lazear Brothers, who were customers of the appellee; and he had given the bank a guaranty to the extent of twenty-five thousand dollars, "for all paper that may be held by the bank, of Lazear Brothers, whether as drawers or endorsers." In addition to notes received by it in the ordinary course of its business with the firm, the appellee had bought at a discount from a broker, a firm note for five thousand dollars. In a suit on the guaranty, the question was whether the amount of the note so purchased could be collected. It was held that the

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[1] It will be seen that in this case the court agrees with the present doctrine of the Supreme Court of the United States in denying recovery on the contract; but differs from the position taken by the latter court, namely, that an *ultra vires* contract is illegal and will not be disturbed when fully executed by both sides.

[2] The suit was, in form, an action of *tort.* The contrary view is noticed in the succeeding chapter.

transaction with the note broker was beyond the corporate powers of the bank and that the purchase being without authority, "the bank acquired no title to the note and cannot recover thereon in this suit."[1] In *Booth v. Robinson,* 55 Md. 435 (1881), the question whether a loan secured by mortgage on a steamboat was *ultra vires* the lending corporation,—was declared immaterial because the contract was an *executed* one. In *Bank v. Katz,* 57 Md. 128 (1881), the appellant, incorporated as a savings institution, had discounted a note endorsed by the appellee and in a suit thereon the defence of *ultra vires* was pleaded. Two questions were raised: First, whether the discounting of a note is a banking privilege and as such was forbidden to the appellant by the law providing that "no corporation created or to be created and not expressly incorporated for banking purposes shall by any implication or construction be authorized to exercise banking privileges"; and secondly, whether if the transaction was forbidden, recovery could be had on the note. The court answered both questions in the affirmative and said that notwithstanding the violation of the law, the appellee was liable because "there are some well recognized, legal and moral distinctions in respect to this doctrine of *ultra vires;* one of which is between executory and executed contracts. As to executory contracts, if made in excess of authority, the courts at the instance of a stockholder, will interfere to prevent performance because such contracts contemplate an unauthorized diversion of corporate funds

[1] Three of the judges dissented. The prevailing rule is that one, not a party to an *ultra vires* transaction, will not be heard to complain of it; and that titles acquired thereunder are as to third parties good. See, for a criticism of this case, *Black v. Bank of Westminster,* 96 Md. 399; and *Bank v. Katz,* 57 Md. 142.

and are therefore a breach of trust. But the rule is different in regard to executed contracts; these by the plainest rule of good faith should be permitted to stand."[1]

In *Heironimus v. Sweeney,* 83 Md. 146, (1896) there was a contest for the assets of an insolvent savings institution between certain weekly depositors, who were members of the corporation and as such entitled to dividends, and special depositors who were only entitled to receive interest on their deposits and were not members. It was contended that the contract with the special depositors was *ultra vires* the corporation. The court quoted with approval both *Foreman's Case* and *Katz's Case,* and said that in either view the special depositors were entitled to a preference.[2] In *Black v. National Bank of Westminster,* 96 Md. 400 (1903), the appellant had executed a note which the payee had procured to be discounted by the Old Town Bank, from which, in turn, the appellee had acquired title. One of the questions in the case was whether the appellee had received the note by purchase or by discount. The court held that there was no legally sufficient evidence of a purchase and that therefore there was no occasion to con-

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[1] See the comment on this case in *Western Maryland Railroad Co. v. Blue Ridge Hotel Co.,* 102 Md. 334.

[2] The quotation from *Foreman's Case,* 29 Md. 532, is as follows: "When a party makes a contract with a corporation which is simply beyond the powers of the latter, he may recover back the money paid thereon whether the contract be executed or executory." *Katz's Case* is quoted for the principle that "it is inequitable to permit one who has received the proceeds and benefit of the contract to repudiate it on the ground that the corporation from which he has obtained the benefit, had no power to make the contract." While in this particular case, both principles worked out the same result, it is submitted that they cannot stand together.

sider the application or correctness of the rule in *Lazear's Case*. Nevertheless it was said, that even had the facts been otherwise, the decision in *Katz's Case* would apply, because the *ultra vires* contract was executed and "by the plainest rule of good faith should be permitted to stand."

Finally, in *Western Maryland Railroad Co. v. Blue Ridge Hotel Co.*, 102 Md. 307 (1905), the question of estoppel was presented in a new and concrete form. The parties had entered into an agreement under which the appellee was to build a summer hotel along the line of the appellant, which, out of resulting traffic receipts, was to pay any deficit, in case the hotel company should be unable to meet the interest on its investment. The hotel was built and when, after many years, the agreement became burdensome to the railroad company, it was repudiated. The court held: (1) That the contract was in essence a guaranty and beyond the powers of the railroad company; (2) that an *ultra vires* contract is void; (3) that no estoppel arose from the performance by the hotel company of what it had agreed to do; (4) that the railroad company was not bound to account for benefits received, because its traffic receipts did not come from the hotel company.[1]

[1] This case, which cites with approval the principal Supreme Court decisions (*supra*, § 73), apparently settles the Maryland law in conformity with the strict rule, namely, that an *ultra vires* contract, being illegal, can never at any time or place or after any degree of performance. be the basis of a recovery thereon. There remains, however, one difference, namely, that under the decision in *Foreman's Case* (which is cited with approval), an *ultra vires* transaction completely executed on both sides can be reopened and recovery had upon a *quantum meruit* for benefits received. Nevertheless, the opinion quotes, without disapproval, decisions which recognize the

Summary: (1) In England, the *ultra vires* transaction is simply non-existent; it is void of legal consequences and pre-existing rights and titles remain unaltered. This is a hard doctrine but logical. (2) In the federal courts it is said, and often repeated, that a contract in excess of granted powers is one which the corporation is "incapable of making" (*Central Transportation Co. v. Pullman Co.*, 139 U. S. 60); and if this were meant, the English result would follow. But in fact such a contract is treated by the federal courts, not as null because of incapacity, but as illegal; and, of course, an illegal transaction may have legal consequences, e. g. when consummated. (3) In Maryland, the latest case distinctly presenting the question follows the earlier decisions in viewing the *ultra vires* transaction from the standpoint of disability rather than that of illegality. Nevertheless, there is a suggestion that, under certain con-

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application of the estoppel doctrine, e. g., "The executed dealings of corporations must be allowed to stand when the plainest rules of good faith so require" (102 Md. 333). But it is very respectfully submitted: (1) A void transaction cannot be made good by any amount of execution. (2) *Foreman's Case* is direct authority for the proposition that even full performance on both sides will not prevent the transaction from being reopened. Note that in *Maryland Trust Co. v. Mechanics Bank*, 102 Md. 614, it is said, *obiter:* "A contract that is simply *ultra vires* is not necessarily unenforceable; it may be enforced under certain conditions." While this *dictum* is irreconcilable with the Maryland decisions, it ought to be the law. The public policy which forbids the usurpation of ungranted powers, is amply protected by the state's right to proceed for a forfeiture of the charter and the stockholders' right to a timely injunction. On the other hand, it seems unjust to impute constructive notice of corporate powers to innocent parties and at their expense to relieve the stockholders (sometimes after long acquiescence) whose agents have been guilty of the wrong.

ditions, transactions consummated on both sides must stand; and a contract fully performed on one side may be enforced "when nothing short of enforcement will do justice" (102 Md. 333). Irreconcilable, however, is the approval of *Foreman's Case* (29 Md. 524),—in which a transaction closed on both sides was permitted to be opened.

§ 77. **Liability of corporate officers for transactions ultra vires the corporation.** On principle, one who, on behalf of a corporation, makes or authorizes a contract which is void because beyond its powers, should be personally liable on an implied warranty of authority.[1] But where (as with the courts holding the strict doctrine) persons dealing with a corporation are charged with notice of the powers conferred by its charter or articles of association, the reason for implying a warranty would seem to cease; and it has been so held.[2]

§ 78. **Title to property acquired in an ultra vires transaction.** Here the public policy which is assumed in the strict doctrine of corporate powers, conflicts with another, namely, that which makes for security of titles. The following is a summary of the result:

First. In English law, as we have seen, the transaction being non-existent is void of legal consequences, and pre-existing rights and titles remain unaltered. So much of his property as the victim can follow, he may recover,—saving, of course, the equities of third parties.

Second. Under the federal law, where the transaction has been consummated on both sides, titles may pass and will not be disturbed. There are, however, two lines of

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[1] *Richardson v. Williamson*, L. R. 6 Q. B. 276.

[2] *Holt v. Bank*, 25 Fed. 812.

decisions to be noted in connection with this rule. (1) In the first place, the "consummation" of the transaction is not a certain test. If a national bank has taken an *ultra vires* mortgage, it can hold and enforce the security against the debtor and subsequent mortgagees (*Bank v. Matthews*, 98 U. S. 621: *Bank v. Whitney*, 103 U. S. 99); and there would be no just ground for a defence where the *ultra vires* mortgage had been given *by* a national bank. But an *ultra vires* lease, while unassailable by a lessor who has fully performed, so long as the lessee is willing to hold the property and pay the rent (*St. Louis Railroad Co. v. Terre Haute Railroad Co.*, 145 U. S. 393) is unenforceable against a lessee who is tired of paying the rent and is willing to surrender title (*Central Transportation Co. v. Pullman Co.*, 139 U. S. 62). (2) In the next place, the federal decisions draw an unsatisfactory distinction between the right to hold property acquired in an *ultra vires* transaction and liability incurred by reason of such holding. Ownership by a national bank of the shares of another corporation, may be lawful if the stock is taken as collateral or in satisfaction of a pre-existing indebtedness. And if the shares so held are subject to a statutory liability in favor of creditors, this may be enforced (*Bank v. Case*, 99 U. S. 628). But if a national bank has invested its funds in such stock, the transaction is "absolutely void"; and the liability of a stockholder cannot be enforced against it.[1]

[1] *Bank v. Kennedy*, 167 U. S. 362, affirming and distinguishing *Bank v. Case*, above cited. It was held that the receipt of dividends worked no estoppel. As no one except the government could challenge the bank's ownership and title, it seems like magic to discover that the transaction is "absolutely void." In *Bank v. Converse*, 200 U. S. 441, a similar case, three judges united in a vigorous dissent. See also, *Bank v. Wehrman*, 202 U. S. 295,—a case of partnership.

Subject to the qualifications of the preceding decisions, which, broadly speaking, distinguish between disturbing a conveyance or transfer and enforcing a contract[1], the following quotation from a recent decision of the Supreme Court, involving the right of a national bank to accept a conveyance of real property to be held in trust, expresses the generally accepted rule: "In the absence of a clear expression of legislative intention to the contrary[2], a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. * * * This rule, while recognizing the authority of the government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared, and this trust should not be permitted to fail and the property to be diverted from those for whom it was intended, by treating the conveyance to the bank as a nullity, in the absence of a clear statement of legislative intent that it should be so regarded." *Kerfoot v. Bank,* 218 U. S. 281.

Third. In Maryland, a corporation may hold and convey property acquired in excess of a statutory or charter limit by a title "valid as to all the world, until it has been determined, at the instance of the State, that the charter

[1] Compare the concluding paragraph of the opinion in *St. Louis Railroad Co. v. Terre Haute Railroad Co.,* 145 U. S. 393.

[2] For what constitutes such clear expression, compare *Fritz v. Palmer,* 112 U. S. 405, and *Building Association v. Denson,* 189 U. S. 408.

has been violated."[1] Again, in *Booth v. Robinson,* 55 Md. 435, the contention was that a loan, secured by a mortgage of a steam boat, was *ultra vires* the mortgagee. The court said that, even conceding the want of power, the transaction could not be disturbed. In *Hagerstown Manufacturing Co. v. Keedy,* 91 Md. 438, an attempt was made to reopen a consummated transaction upon the authority of *Foreman's Case* (*supra,* §76). The appellee, receiver of a beneficial association which had purchased some town lots of the appellant, was reclaiming the purchase money upon tender of a conveyance. It was held that the transaction would not be disturbed even if it were *ultra vires:* "When a corporation has by its charter or by general statute, power to hold land for some purposes * * * its right to take and hold any particular parcel of land is a matter solely between the corporation and the state, and can be called in question only in a direct proceeding instituted by the state for that purpose.[2] The doctrine that even where a corporation has no power to take or hold real estate, a deed made to it is not void but voidable, and that only at the suit of the state, has found strong support."

§ 79. **Irregular exercise of granted powers.** A statute conferring upon the corporation a particular power may prescribe the way in which it is to be exercised and the result manifested. For example, the question of increasing

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[1] *Re. Stickney's Will,* 85 Md. 107; *ante,* § 38. This is also the rule of the federal courts; and while the cases deal with devises and bequests, the principle is not so limited.

[2] Compare *State v. Consolidation Coal Co.,* 46 Md. 1. The rule, however, has no application where a corporation is asking the court to aid it in acquiring title to property which it has no power to hold. *Case v. Kelly,* 133 U. S. 21.

the capital stock must be passed upon at a corporate meeting, duly called, warned and held; and a certificate of increase in prescribed form must be recorded. In such and similar cases, the resulting act may be unauthorized and invalid because the power has been defectively exercised. The broad principle applicable to such situations is this: Where the corporation has done irregularly something that might have been done regularly; or where the validity of an act depends upon the existence of extraneous facts, notice of which is not properly chargeable to third parties, then the rights of such parties, having no actual knowledge, will not be affected by the failure to exercise the power in the manner prescribed. Where, however, the facts upon which the validity of the transaction depends are required by law to be embodied in a recorded certificate, then third parties are charged with knowledge of what the record shows; but they have the right to assume that the recitals of the record are true. The following cases illustrate the principle and show the great length to which courts will go in upholding transactions depending upon granted powers defectively exercised.

In *R. R. Co. v. Louisville Trust Co.*, 174 U. S. 570, the appellant had endorsed the bonds of another corporation and it was conceded that the transaction would have been *ultra vires* but for a statute which granted the power upon condition that it should be exercised only upon a petition made to the directors by the holders of a majority of the shares. No such petition was ever presented, and at a subsequent meeting of shareholders, the guarantee was disapproved as having been made without legal authority. The appellee had taken some of the bonds so endorsed without notice of the defect and its title was held to be good. The

court said: "The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established and has been constantly recognized by this court. * * * One who takes from a railroad or business corporation in good faith and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation and disclosing upon its face no want of authority, has the right to assume its validity if the corporation could by any action of its officers or stockholders or of both, have authorized the execution and issue of the obligation. * * * If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence and the corporation is estopped to deny them."[1] In *Handley v. Stutz,* 139 U. S. 417, a meeting of shareholders, to consider an increase of stock, was held out of the domicil of the corporation. Moreover, the meeting was not duly warned and

[1] In *Harrison v. R. R. Co.,* 50 Md. 494, this principle was applied to sustain the action of directors, who, it was alleged, were not legally elected. In *Cole v. La Grange,* 113 U. S. 1, negotiable bonds were issued by a municipal corporation. by way of donation, to a private manufacturing company. This appeared on the face of the bonds; and they were held void in the hands of a *bona fide* purchaser for value. The bonds had been issued under the authority of the legislature; but the court said: "The general grant of legislative power in the Constitution of a state, does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property for any but a public object." In *Cahill v. Maryland Ins. Co.,* 90 Md. 346, it was held that the omission of the corporate seal, notwithstanding a charter requirement, would be a matter of irregularity, merely.

no certificate of increase was recorded as a statute of the creating state required. The court held that notwithstanding all these defects, the issue of increased stock was voidable, and not void, as it would have been had there been no power to issue it.[1] In *Scott v. Deweese,* 181 U. S. 202, the appellant was being sued for the statutory liability to creditors imposed upon holders of shares in national banks. The shares were a part of an increase made without compliance with the statute providing, that "no increase of capital shall be valid until the whole amount of such increase is paid in and notice thereof has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof and that it has been duly paid in as part of the capital of such association." In point of fact, the whole amount of the proposed increase was not paid in, nor had the certificate of the Comptroller been obtained. The court held that this was a matter between the corporation and the government, and did not render void the subscriptions or certificates of stock based upon the capital actually paid in, or relieve the subscriber of his statutory liability.

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[1] Distinguishing *Scovill v. Thayer,* 105 U. S. 143, in which there was an entire lack of authority to make the increase and not simply a power defectively exercised. Here the court held that the increase was *ultra vires* and void; and that the defendant, a holder of the pretended stock, was not estopped from denying its validity or his obligation to pay for it, even as against a creditor. See, to the same effect, *Oler v. R. R. Co.* 41 Md. 583.

CHAPTER XIII.

TORTS AND CRIMES.

§ 80. **History of the law.** Upon principle, every wrongful act of a corporation must be *ultra vires;* and such was once the law. At a comparatively recent period, however, the departure from the theory began, and it has continued until it may now be said that, with some limitations, a corporation is liable for the torts of its servants and agents, where under similar circumstances, a natural person, being the master or the principal, would be liable.

The present law has been reached by progressive stages. The first modification of the rule of complete immunity was in cases where the wrongful transaction had been authorized by writing under the common seal. Then, liability was extended to the case of negligent performance of authorized acts; then, to the case of wrongs committed with force and violence; and finally, it became possible to hold a corporation responsible for wrongs involving mental states,—such as malice, intent, guilty knowledge and the like. In *Medcalfe v. Insurance Co.,* 45 Md. 198, one of the questions presented was whether the appellee could be held in an action for malicious prosecution. The court found it unnecessary to decide the question, but in the subsequent case of *Carter v. Howe Machine Co.,* 51 Md. 290, the same point was squarely presented and determined in the affirmative

as follows: "It would seem now to be clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether wilful or malicious, of their agents or servants done in the course of their employment. Hence, it has been repeatedly decided that corporations are liable in actions for assault and battery and false imprisonment, committed by their servants and for false representation, and for libel as well as for all consequences of the negligent or unskillful acts of their servants, within the scope and course of their employment; and it would appear that actions for such injuries may be maintained against corporations aggregate in any case where, under similar circumstances, such actions could be sustained against individuals for the acts of their servants."[1]

§ 81. **Application of the modern rule.** To hold a natural person for wrongs committed by his servant or agent, you must show that the act was expressly authorized; or that it was subsequently ratified and adopted; or that it was committed within the scope and course of the employment. The same requirements exist where you are seeking to hold a corporation; but in the latter case there is more difficulty in determining whether or not a particular act meets the third requirement; and the tendency of the courts is to draw

[1] One of the still debatable questions is whether a corporation may be sued for slander. The cases are collected in notes to 2 Wilgus, Corp. 1255; 9 L. R. A. (N. S.) 929; 21 L. R. A. (N. S.) 873. In *Supreme Lodge v. Unverzagt*, 76 Md. 104, the appellant was complaining of slanderous allegations made against it in a suit instituted for its dissolution. The court said "The plaintiff being a corporation, has no personal character to be injured by the alleged slanderous allegations and it is not made to appear in what manner such allegations affected its property."

the line of apparent authority rather closely. In *Tolchester Co. v. Steinmeier,* 72 Md. 313, the superintendent of the appellant had ordered the arrest of the appellee, and the arrest was made by a special policeman commissioned and employed for the protection of the corporate property and the preservation of order thereon,—the salary of the officer being paid by the appellant. In a suit for false imprisonment, the court held that the appellant was not responsible because the policeman was not its servant and the superintendent was not acting within the scope and limits of his employment. In *Turnpike Co. v. Green,* 86 Md. 161, a gate-keeper of the appellant had sworn out a warrant for the arrest of the appellee on his refusal to pay toll. It was the duty of the toll gatherer, under the charter, to stop any person from passing through the gate until the toll was paid; and a statute passed for the benefit of the appellant, authorized the arrest of any person who should attempt to defraud it of tolls; moreover, the gate-keeper, before swearing out the warrant, consulted with the attorney of the company and was referred to the statute. It was nevertheless held that the company was not responsible because the arrest was not within the scope of the employment.[1]

§ 82. **Torts growing out of ultra vires transactions.** Where a wrongful act is committed in an *ultra vires* transaction, there is some diversity of opinion as to the liability of the corporation therefor. In this country the weight of authority, inclining to convenience rather than logic, favors

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[1] See also, *Railroad Co. v. Brewer,* 78 Md. 401; and compare *Boyce v. Coxen,* 92 Md. 366. More recent cases are: *Beiswanger v. American Bonding Co.,* 98 Md. 287; *Deck v. B. & O. R. R. Co.,* 100 Md. 168; and *Railroad Co. v. Stumpo,* 112 Md. 579,—in which the earlier cases are reviewed.

the view which asserts the liability.[1] In *Weckler v. Bank,* 42 Md. 581 (1875), there is an apparent exception to the general rule. The appellee was sued in an action of deceit, for false representations made by its teller to the appellant in the sale of certain railroad bonds. The court said: "We are, therefore, clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question." Here, however, the tort was incidental to the contract. In *Bank v. Petrie,* 189 U. S. 425, *Weckler v. Bank* is distinguished and apparently approved on the ground that "An action for damages caused by fraudulent representations which induced a contract affirms the contract and relies upon it, and therefore may be subject to the same defenses as an action brought directly on the contract."[2]

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[1] See *Bank v. Graham,* 100 U. S. 699; 2 Machen, Corporations, sec. 1072. For the English view, see Pollock on Contracts 121. Where the undertaking of a municipal corporation is wholly *ultra vires.* it is not liable for a tort therein committed by its agents. *Horn v. Baltimore,* 30 Md. 218; 25 Harvard Law Rev., 648.

[2] In *Bank v. Boyd,* 44 Md. 60 (1875), the appellant was held for negligence as a bailee on the ground that the bailment was not gratuitous, and therefore not *ultra vires.* In *Bank v. Graham,* 100 U. S. 699 (1880), it is said that gross negligence on the part of a gratuitous bailee is a tort, and the doctrine of *ultra vires* has no application.

§ 83. **The measure of damages.** There is also a diversity of opinion upon the question whether punitive damages may be recovered from a corporation for the wrongs of its agents and servants not expressly authorized, but committed in the course of their employment. In *R. R. Co. v. Prentice,* 147 U. S. 101, the appellee had recovered a verdict of six thousand dollars in a suit against the appellant, for the wanton and aggravated misconduct of one of its conductors. The judgment was reversed on the ground that "a railroad corporation cannot be charged with punitive or exemplary damages for the illegal and oppressive conduct of a conductor toward a passenger."[1] The contrary view, however, seems to be the prevailing one,[2] and it is the law of this state. In *R. R. Co. v. Larkin,* 47 Md. 155, it is said: "That the jury may be allowed to give exemplary or punitive damages against a railroad company, in an action by a passenger for illegal and violent expulsion from their train, is no longer an open question in this state."

§ 84. **The exemption of charitable and public corporations.** The common law immunity from suit in tort survives in two cases.

First. Where the corporate funds are held not for profit but solely for charitable purposes; and where the corporation has exercised due care in the selection of its agents, it is not responsible for wrongs committed by them. In *Perry v. House of Refuge,* 63 Md. 20, the appellant had been assaulted by one of the officers of the appellee, which was a corporation instituted for charitable purposes. It

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[1] In *Railroad Co. v. Harris,* 122 U. S. 597, punitive damages were allowed on the ground that the vice-president of the railroad had participated in the tort.

was held that damages could not be recovered from the corporate funds and that the only redress of the injured party was against the wrong-doer.[1]

Second. Public corporations, being agents of the sovereign state, share its immunity from suit unless in the charter or some governing statute, liability is imposed upon them either expressly or by implication. Such liability will arise where the law expressly or by necessary intendment imposes a duty upon the public corporation, gives it the means of discharging the duty and the power of raising money for the purpose of paying damages in the case of a breach,—but not otherwise. In *Weddle v. School Commissioners,* 94 Md. 334, the daughter of the equitable plaintiff was killed by negligence in the maintenance of a school ground, under the general supervision and control of the appellee. The appellee was a body corporate with power to sue and be sued, but it had no power to raise a fund for the purpose of paying damages. It was held that the suit could not be maintained.[2]

§ 85. **Crimes.** The law governing the liability of a corporation for criminal offenses has developed much in the same way as that relating to its torts. Originally, the fictitious person could not commit crime; then came the rule that it might be indicted for acts of non-feasance,—

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[1] "While this rule of law is well established, the reasons assigned for it are not uniform. Some courts hold that the funds of a charitable corporation cannot be appropriated to payment for an injury arising from the neglect or wrongdoing of its servants; others exempt charitable corporations from liability on the ground of public policy; still others hold that one who accepts the benefits of a charity assumes the risk of negligence."—6 Cyc. 975-76.

[2] See also, *Carter v. Worcester County,* 94 Md. 626,—a case of false imprisonment; 13 Cyc. 117; and 17 L. R. A. (N. S.) 344, note.

such as the failure to perform some public duty; finally and by progressive stages, the rule was established as it now exists, supported by the great weight of authority, that for mis-feasance as well as for non-feasance, the corporation is indictable. There are, of course, certain crimes which in the nature of things a corporation cannot be guilty of, and similarly, there are punishments such as imprisonment, that it cannot undergo.[1] It may be punished by fines and forfeitures,—including forfeiture of the charter; and, in a given case, the offense of the corporation may also be the offense of some officer or agent.[2]

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[1] If a penal statute is sufficiently broad to include corporations, and inflicts both fine and imprisonment, a corporation may be fined under it. *United States v. Union Supply Co.*, 215 U. S. 51. See also, *N. Y. C. R. Co. v. United States*, 212 U. S. 481.

[2] See, for a full discussion of the subject, 5 Thompson Corporations, secs. 6418, etc.; 2 Morawetz Corporations, sec. 733.

PART VI.

CAPITAL STOCK.

CHAPTER XIV.

DESCRIPTION AND CLASSIFICATION.

§ 86. **Scope of Part VI.** The difficult questions of corporation law thus far treated arise mostly from the application to modern business corporations of theories evolved from the earlier types. The *de facto* and the estoppel doctrines applied to the defence of *nul tiel corporation;* estoppel applied to the defence of *ultra vires;*—these represent the effort of the courts to prevent, as far as possible, the injustice that sometimes results when you measure and regulate by the fiction theory all the manifold dealings between business corporations and the community.

The subject of capital stock, however, is a part of the modern law, and one might reasonably expect to find it free from conflict of decision and confusion of ideas. But here also, original conceptions have shifted; earlier views and theories have been modified or abandoned;[1] and many important questions are answered in different and some-

[1] The courts formerly treated shareholding as merely an incident of membership. A member had but one vote, no matter how many shares he owned; nor could he transfer his shares to whom he pleased. In the modern view, the share, considered as transferable property, is the principal thing and membership is the incident. It is said that in the old trading companies, the capital stock was subscribed for each venture; a member might be, but was not necessarily, a shareholder.

times contradictory ways, by the several courts. In the following discussion it is proposed to consider the nature of capital stock and of shares and certificates; the classes of stock usually met with and their legal characteristics; how the relation of shareholder is created; the liabilities and incidents of this relation; and how they are transferred and terminated.

§ 87. **Capital stock as a legal conception.** Stock capital is characteristic of a business corporation, and it may be compared with the capital contributed by partners to the firm. The resemblance would be closer, if each partner's liability for the firm's debts were limited to the share of the capital paid in or promised by him; and if, by assignment, he could substitute the transferee to his rights and obligations in the firm, without the consent of his co-partners. But there is another and a crucial difference. The firm is under no obligation to keep its capital at the amount originally promised or contributed; and, ordinarily,[1] the partners may at any time, by mutual agreement, re-convert the common fund into several ownership. With the corporation it is not so. Stock capital is capital at stake, and in the original conception this stake must not only be put up or secured, before the game begins, but it must be kept up until the game is over,—that is to say, until the business is liquidated and the creditors paid. The charter or certificate of incorporation prescribes the amount of capital stock which the corporation may issue, and the number of shares (each having an equal or "par" value) into which it is divided. These

[1] For the exceptional case see *Franklin Co. v. Henderson*, 86 Md. 452.

shares are taken by subscribers who, in consequence, become members of the corporation, entitled, upon payment, to receive from it certificates of share ownership. The money thus received in payment for the capital stock, and of course anything in which it is subsequently invested, constitutes the stock capital—the stake pledged for the security of creditors.

§ 88. **Capital stock, stock capital, and capital.** In ordinary usage, the term capital stock has two meanings which are different. Sometimes it is used abstractly as an arithmetical expression to indicate the sum of the authorized shares, taken at their par value: the nominal figure which limits the number of shares that may be issued and fixes the relative interests of the shareholders. At other times the concrete property, representing what has been paid in for the shares, is called the capital stock; and when this is worth less than the par value of the outstanding shares, the capital stock is said to be impaired. The latter is the correct meaning of the term. Capital stock meant the common fund; a share was an undivided interest in it, and was regarded as real or personal property, according to the nature of the corporate assets.[1] As will be noticed later, this view of the nature of a share no longer prevails; but there has not been a corresponding adjustment of terminology. The fundamental idea, however, and one which, if kept in mind, makes the ambiguity of phrasing unimportant, is this: So much of the corporate assets as represents payment for shares which have been issued constitutes the stock capital. The actual capital, the sum of all the assets, may be

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[1] *Coombs v. Jordan*, 3 Bland 284.

greater or less than the stock capital, according as profits have been accumulated or losses incurred. The surplus, being free capital, may be accumulated or returned to the shareholders as dividends; but everything the corporation, while a going concern, owns up to the par value of the outstanding shares, is stock capital, capital at stake, and cannot be drawn down by the shareholders, except as a portion may be converted into surplus through a statutory reduction of the capital stock.

§ 89. **Illustrative cases.** The habit of using the term capital stock, now abstractly to indicate the sum of the shares, and again concretely as meaning corporate property, is inveterate; and some of the difficulty arising from applying the same name to different things, is shown by the following cases. In *Farrington v. Tennessee,* 95 U. S. 679, it is said: "The capital stock and the shares of the capital stock are distinct things. The capital stock is the amount paid or authorized or required to be paid in as the basis of the business." Here there is confusion. A share of capital stock cannot be a thing distinct from that of which it is a share; but it is true that what the shareholders own and what the corporation owns, are distinct properties and not different interests in the same property. This is made clear in *Tennessee v. Whitworth,* 117 U. S. 129, where the charter under discussion provided that the capital stock of a railroad company should be exempt from taxation forever and the corporate property for twenty years. This was held to exempt the shares perpetually because "as the whole is exempt, so must necessarily be its several parts." In the same case, however, the court speaks of the "franchises, the capital stock in the hands of the corporation, the corporate property and the shares of capital stock in the hands

of the stockholders," as being distinct taxable properties. Here, capital stock means stock capital; shares can have no existence for taxing purposes until issued.[1]

§ 90. **Modifications of the original conception.** When business enterprises began to take corporate form, the existing and still prevailing theory recognized no liability on the part of the members for the corporation's debts. To protect creditors, or at least to give them notice of what they had to trust to, special charters usually required all or some part of the stock to be paid in before the commencement of business. The first general incorporation laws aimed at the same result; and, taking the situation in Maryland as typical, the principles established by statute and judicial decision were these: 1st. The courts treated every subscription as subject to the implied condition that all the shares should be taken,—so that consequently, no calls for payment could be made until all the authorized stock was subscribed. 2nd. A shareholder participating in the conduct of business and the incurring of debts before all the shares were taken, waived this implied condition of his subscription. 3rd. The corporation had no power to accept less than par for its shares or to receive anything other than money in payment.[2] 4th. Until all the shares were taken and paid for, every shareholder, notwithstanding he had fully paid his own subscription, was liable to creditors in a sum equal to the par value of his holdings. The net result

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[1] *Consumers Ice Co. v. State,* 82 Md. 132. The cases quoted in §89 are examined in *Bank v. Tennessee,* 161 U. S. 147. It is there said that "capital stock in the hands of the corporation" means stock capital; and "corporate property" means surplus. Note the terminology in *Wright v. Georgia R. & Bkg. Co.,* 216 Md. 420.

[2] Code of 1860, Art. 26, sec. 40.

of these and similar provisions in other states, was to hinder, if not to prevent, the corporation from commencing business until the fixed stake was paid in, and to make the nominal capital stock a true indication of the actual stock capital. The tendency of later legislation has been to undo this result, and the tendency expresses a changed view of public policy. The common sense idea became current that persons who may be asked to extend credit to a corporation, are able to take care of themselves and to find out, if they want to know, how much of the authorized capital stock has been subscribed and paid for; and that where the business of the corporation is purely private, the law need not provide how much capital shall be raised before corporate operations are begun. Of the four principles above enumerated, the first and second are still the law of this state;[1] but the fourth has been so changed, that except in the case of banks, safe deposit, trust and loan companies, which are governed by special statutes, a shareholder whose share is paid for, is under no liability to creditors.[2] The farthest reaching modification touches the third principle. It is now possible to pay for shares in property at an inflated valuation, provided the transaction is free from actual fraud; and there is high authority for the proposition that under some circumstances a corporation may, in the absence of statute, dispose of its shares at less than their par value.[3] It would not be accurate to say that the earlier policy, in which the rights of creditors were recognized and protected, has been abandoned. On the contrary, it is as true now as it ever was that the money or property which represents

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[1] See *Morgan v. Landstreet,* 109 Md. 558.

[2] See *post,* Chapter XVI—Liabilities of Share Ownership.

[3] See *post,* § 110.

the outstanding shares, the stock capital as it has been called,—may not, by any scheme or indirection, be withdrawn by the shareholders at the expense of creditors. But what the modifications of the earlier policy have effected is a loosening of the former connection between authorized capital stock and actual stock capital. To say now of a corporation actively engaged in business that it has a capital stock of ten thousand dollars, gives no idea of the number of shares that have been taken or of what the corporation may have received in payment for them.

§ 91. **The nature of a share.** After it comes into existence by being subscribed for, a share enters upon an independent career as a species of personal property distinct from that of the corporation.[1] It is a chose in action and not "goods, wares and merchandise" within the meaning of the Statute of Frauds.[2] A share is a fraction of the right to control the corporation; to share in any profits, while a going concern, and in the remains after a winding up. Men-

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[1] Code (1911) Art. 23, sec. 37. There is a conflict of opinion as to the *situs* of share property. For the purposes of execution and attachment, such *situs* is uniformly the domicil of the corporation. *Post,* §141. See *Lowndes v. Cooch,* 87 Md. 487; and compare *Jellinik v. Huron Co.,* 177 U. S. 8. In the former case it was held that the validity of a bequest of shares in a Maryland corporation will be determined by the law of the testator's domicil. In the latter case there was a contest over the title to shares in a Michigan corporation held by non-residents of that state. It was held that the suit was properly brought in the circuit court of the United States for the western district of Michigan, because the shares "were personal property within the district."

[2] *Colonial Bank v. Whinney,* 11 App. Cases 426; *Webb v. R. R. Co.,* 77 Md. 98. But see, now, Uniform Sales Act, Code (1911) Art. 83, sec. 25. Trover, as for a conversion, will lie in the case of both the share and the certificate. *Jones v. Ortel,* 114 Md. 215.

tion has been made of the earlier view in which the share was regarded as representing and measuring an undivided interest in the corporate property,—the legal title to which was treated as held by the corporation as trustee for the shareholders. The modern view dates approximately from 1836;[1] and its principal cause and effect are to be found in the legislative attempts, upheld by the courts with a laudable disregard of precedent, to increase the taxable basis by treating corporate property and share property as distinct taxable values, and thereby to avoid double taxation.[2]

§ 92. **The nature of a certificate.** A share certificate is primarily a representation by the corporation that the person named therein is the holder on its books of a certain number of its shares. It will be seen later that other statements in the certificate are of importance, but primarily it is merely evidence of ownership. The certificate is not the share, just as the deed is not the land; and one may be an owner of shares for which no certificate has ever been issued. Certificates are numbered for convenience, but, in its nature, a share has no number and is incapable of identification. So, for example, giving the wrong certificate number will not prevent the transfer of a share intended to be

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[1] *Bligh v. Brent,* 2 Y. & Coll. 268; 2 Harvard Law Rev. 151; 18 Harvard Law Rev. 455. When shares were regarded as undivided parts of the corporate assets, questions of difficulty arose as to whether they were real or personal property. In *Coombs vs. Jordan,* 3 Bland 284, it was said that a share would be real property "if the profits of the corporation were derived chiefly from land used in any way whatever."

[2] See *Wilkens Co. v. Baltimore,* 103 Md. 293; and *post,* Chapter XX—Taxation.

transferred;[1] and the conversion of a certificate is not necessarily a conversion of the share. If you detain from the owner a promissory note, you deprive him of more than the piece of paper, because the obligation is inseparably bound up in the writing. But this relation does not exist between the certificate and the share; and the conversion of the former may, but it need not necessarily, deprive the owner of his property in the latter.[2]

§ 93. **Negotiability.** The question whether, apart from statute,[3] a share certificate is negotiable has given rise to much discussion, and some of the difficulty is due to the looseness of thought concealed in the statement that a certificate is "*quasi* negotiable." When you say of a particular instrument that it is negotiable, the definite and single meaning is that a *bona fide* holder for value may get a good title, even from a finder or a thief. You look to the law, merchant and statute, and not to usage,[4] to determine whether instruments of a particular description are negotiable; but whether a particular instrument, within the description, is in a negotiable condition depends, first, upon whether it

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[1] Ind's Case, L. R. 7 Ch. App. Cas. 485. And compare: *Rich v. Boyce,* 39 Md. 314; *Worthington v. Tormey,* 34 Md. 182.

[2] In *McAllister v Kuhn,* 96 U. S. 87, it is said: "A blank indorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed, and in this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock." See Lowell, Transfer of Stock, sec. 11; and *Jones v. Ortel,* 114 Md. 215.

[3] The Uniform Stock Transfer Act (Code 1911, Art. 23, secs. 38-60) makes a share certificate, substantially, negotiable; and has changed materially the law stated in this section. The Act is discussed *post* Chapter XVII—Transfer of Stock. It applies only to certificates issued after July 1, 1910.

[4] *Bank v. Taliaferro,* 72 Md. 169.

has been actually issued, and secondly, upon whether it is in such a state as to endorsements, that the true owner could by delivery pass the full legal title to the obligation contained or the property described in it.[1]

Tested by these principles a share certificate is not a negotiable instrument: 1st. Neither finder nor thief can deprive the true owner of his share, although the certificate is so endorsed that the true owner could by simple delivery pass the title. 2nd. Where a by-law or the certificate itself declares that a share is transferable only on the books of the company, the delivery of the certificate duly endorsed by the true owner, passes only an inchoate title; and in the case of a gift of shares, delivery of the endorsed certificate is not enough to perfect the title of the donee; until the shares are transferred on the books of the corporation there is no delivery of the gift.[2] 3rd. Where the charter[3] or a general incorporation law[4] gives the corporation a lien on its shares for any indebtedness of the shareholder,—even an endorsee of the certificate who takes the same for value and without actual notice is bound by the lien. 4th. The transferee of a certificate from the registered holder of a share takes the share subject to the lien of any execution issued against such holder prior to the transfer.[5] It is true that a wise policy favors free alienation of shares and

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[1] For example, a check drawn and signed but left in the check book and stolen by the payee is not issued. A check which the payee has delivered but forgotten to endorse, is not in a negotiable condition:—Willis, Law of Negotiable Securities, 8, 62; *Whistler v. Forster*, 14 C. B. N. S. 248.

[2] *Baltimore Retort Co. v. Mali*, 65 Md. 97; *Pennington v. Gittings*, 2 G. & J. 208.

[3] *Reese v. Bank*, 14 Md. 271.

[4] *Hammond v. Hastings Co.*, 134 U. S. 401.

[5] *Morton v. Grafflin*, 68 Md. 545; *Noble v. Turner*, 69 Md. 519.

refuses to subject a purchaser to claims on the part of the corporation of which he had no actual or constructive notice. It is also true that the owner, by clothing another with the indicia of ownership, may be estopped from denying the authority of the latter to dispose of the shares; but in no case is there any necessity for impairing the fixed and definite meaning of the word negotiable.[1]

§ 94. **Classes of stock.** There are to be found in the books various designations of capital stock, of which some are terms of the law and others of the market. Original is contrasted with increased stock; common with preferred; authorized with issued and over-issued. Then we have treasury stock, dividend stock, scrip, bonus stock and watered stock. Some of these terms indicate a real classification of the subject matter. Increased and preferred shares differ in their legal attributes from those which are original and common; and these attributes will be presently noted. For the rest, only a passing comment is necessary. The word authorized, used in connection with original or increased stock, may contrast a legal issue with an over-issue; or a permissible with an actual legal issue. Scrip usually means a certificate for an interest convertible into stock,—as where the interest is fractional or the share is

[1] Courts differ as to the facts necessary to raise the estoppel; but there can be none where the instrument itself gives notice of any limitations upon the authority of the bearer. See *Taliaferro v. Bank,* 71 Md. 212; and compare the English doctrine adopted by the court with that of the New York cases cited. In *Tome v. R. R. Co.* 39 Md. 105, Judge Alvey speaks of the principle as well settled, that where "a pledgor has been, by the act of the real owner, clothed with the apparent title to the stock, the pledgee may hold it against the claim of the real owner." See *post,* Ch. XVII—Transfer of Stock; and note 3, p. 167.

not fully paid. Dividend stock is the term applied to shares issued as dividends in lieu of money, when the corporation has a surplus whether in cash or property.[1] Stock is "watered" where it is fictitiously paid up or where its value is diluted by the issue of stock dividends; if these do not exceed the fair value of the surplus, the result is simply to reduce the shares to their par value; it sometimes happens, however, that a surplus is taken at an excessive valuation. Bonus stock is that acquired for less than its par value, commonly in connection with the purchase of bonds or preferred shares; and it will be seen later that the holder of bonus stock may be responsible to the creditors of the corporation up to its par value. Treasury stock is a term of doubtful meaning in the law, largely because the idea which it expresses is a departure from the original conception of capital stock. Un-issued shares are not property, much less are they corporate property. But, as we have seen in the discussion of corporate powers, shares once issued may, under certain circumstances, come into the possession of the corporation.[2] Such shares will not be merged; if paid up, they may be sold again like any other corporate property; and, until disposed of, they are usually called treasury shares. The term, however, has frequently a different and more modern signification. Statutes in most of the states now provide that stock may be paid for in property as well as by money. If the corporation is formed for some such purpose as taking over a business, or develop-

[1] It may be worth while to repeat that the assets of a corporation up to the par value of its outstanding shares represent its stock capital,—the stake that may not be returned as dividends.

[2] *Ante*, page 61.

ing land, or exploiting a patent,—the usual and ordinary scheme of promotion is this: a valuation will be put upon the property higher than the owner is willing to accept even in shares; and the stock in excess of that which the owner is to retain will, as thus "paid up," be turned back to the corporation or to some trustee to be held as treasury stock. This may then be sold at less than its par value or given as a bonus to those who, as subscribers or bondholders, invest money in the enterprise. As has been said, such gifts sometimes involve a liability to the creditors of the corporation.

§ 95. **Increased stock.** It has already been noted that the power to change the capital stock, either by increasing or diminishing the number of shares, is an extraordinary power which must be exercised in substantial compliance with the statutory requirement.[1] There are, moreover, some important particulars in which increased shares differ from those which are part of the issue originally authorized.

First. Unless the charter or some controlling statute provides differently, the holders of the original shares are entitled to participate proportionately in the increase; and this is a matter of right and not of favor. The privilege belongs to those who are shareholders when the increase is ordered; and a waiver of the right, made prior to that time, cannot affect a transferee of a share, if the latter had no knowledge of the waiver and gives timely notice to the corporation of his desire to participate in the increase.[2]

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[1] *Ante*, § 40.

[2] *Real Estate Co. v. Bird*, 90 Md. 229; 26 Am. Eng. Encyc., 2 ed. 947. The stockholder's right of pre-emption is satisfied by giving him the equal opportunity with the others of preserving his "relative vote and voice" in the management of the corporation. Some cases hold that the right applies to original stock remaining untaken.

Second. Increased stock differs from original in that subscription, merely, does not create the status of shareholder. Not until the price is called for and paid does the status exist.[1] In *R. R. Co. v. Hambleton,* 77 Md. 341, it is said: "If by a mere subscription for new stock the subscriber becomes a stockholder, he at once becomes clothed with all the rights of a stockholder and, without the payment of a dollar, he would be at liberty to vote his stock and entitled to claim dividends upon it. * * * Hence the policy of a corporation might be molded or controlled by mere subscribers who have paid nothing upon their subscriptions, to the prejudice or loss of the full paid shareholders whose money, contributed in the beginning, had actually developed the enterprise."[2]

Third. "Between such stock as may be authorized and required by the charter, that is, original or formative stock, and increased stock, there are substantial differences. In case of the issue of increased stock, there are no implied

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[1] Code (1911) Art. 23, sec. 19, provides that increased stock may not be voted until paid for.

[2] Apparently the same reasoning would apply to shares which are a part of the original capital stock,—where such shares are subscribed for after the corporation has begun business and the shares originally issued have been fully paid. But the distinction taken in the case cited in the text is between "original or formative stock and subscriptions for new stock which a corporation, after its organization, has been authorized to issue"; and it is said that "there is a substantial difference between an increase of capital and a filling up of one both authorized and required." The general law does not now require a corporation to have any definite amount of its authorized capital stock subscribed for before it begins to do business; and the term "formative stock" no longer has any definite signification.

understandings that the whole of the authorized issue shall be subscribed for."[1]

§ 96. **Preferred stock.** To say of a share that it is preferred, indicates that it has some advantages over a common share, but gives no precise information as to their nature and extent. And this is so because the preferences are created by agreement and not, primarily, by the law. A statute may indeed confer upon the corporation the right to issue a preferred stock having privileges that no mere agreement of the shareholders can confer,—such for example as priority over creditors; but where the rights of creditors are not involved, the incidents of such shares are what the agreement of the shareholders makes them, and the preferences over the common shares will be no greater than such agreement requires. Where no statute controls, the following views prevail,—some of which have already been noted.[2]

First. Without any statutory power, the shareholders may, by unanimous agreement, classify the shares and confer upon some of them any preferences over the others which affect only the relations of the shareholders among themselves and do not concern creditors.[3] Increased stock as well as the original issue may be thus classified.[4]

Second. Subject to the limitations just mentioned, the preferences may be of various descriptions. In the simplest form, preferred shares are merely entitled to dividends at an agreed rate out of the profits, before any are set apart for or paid to the common shareholders. Such dividends

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[1] *Bank v. Brown*, 95 Md. 386; 10 Cyc. 544.

[2] *Ante*, § 41.

[3] *Scott v. R. R. Co.*, 93 Md. 503.

[4] *Ante*, § 41; *Heller v. Marine Bank*, 89 Md. 602.

are, unless otherwise provided, cumulative,—that is to say, the arrears of poor years will be payable out of the surplus of good ones.[1] Unless otherwise agreed, a preferred share will have no preference over a common one in the distribution of the corporate assets upon a winding up; but such a preference may be given. The preferred shareholder is not a creditor, because if there are no profits fairly applicable to the payment of dividends, no debt arises; nor can he complain if the directors, in the honest exercise of their discretion, devote net earnings to betterments instead of to dividends on the preferred stock.[2] The preferred shareholder has all the rights and is subject to all the liabilities of the holder of a common share, and, unless otherwise provided, he is entitled to vote.[3]

Third. If, however, the creation of preferred shares involves an increase of the stock; or if any of the existing shareholders dissent; or if the privileges to be conferred upon the preferred shares touch and concern the rights of

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[1] Elliott Corp. sec. 314; and see cases cited in the argument of counsel in *Scott v. R. R. Co.*, 93 Md. 482. The question in this case was whether preferred stock is entitled to share *pro rata* with common in the surplus remaining after the latter has received a dividend equal to that paid to the former. The court held that whatever might be the rule where the agreement under which the shares are issued is silent, the particular agreement before it required an answer in the negative. The question is decided in the affirmative in *Sternbergh v. Brock*, 225 Pa. 279, 24 L. R. A. (N. S.) 1078 (annotated).

[2] *Field v. Lamson Co.*, 162 Mass. 388; *R. R. Co. v. Nickals*, 119 U. S. 296. The former case is reported with a valuable note on preferred, guaranteed and interest-bearing stock, in 27 L. R. A. 136. See also 21 L. R. A. (N. S.) 228.

[3] See 2 L. R. A. (N. S.) 121; 2 Beach, Priv. Corp., sec. 497.

creditors,—then the power to issue such shares must be sought for in some statute. The resulting stock is usually called statutory preferred stock and its incidents are, of course, what the statute makes them.

§ 97. **Statutory preferred stock in Maryland.** As it originally stood, the act of 1868 gave to every corporation having the power to issue bonds and secure the same by mortgage, the right to issue a preferred stock; to dispose of the same by sale or by subscription on such terms as in the judgment of the corporation might be expedient; and to grant to the purchaser or subscribers a perpetual dividend of six per cent. per annum out of the profits of the corporation, before any dividend should be distributed to any other shareholder. By the amendment of 1880, Chapter 474, a new feature was introduced. This provides that the stock issued under it shall constitute a lien on the franchises and property of the corporation and have priority over any subsequently created mortgage or other incumbrance. The statute by its terms relates to increased stock and not that originally authorized; and the holder of the preferred shares occupies toward the corporation the dual and inconsistent relation of shareholder and preferred creditor.[1]

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[1] In *Heller v. Marine Bank*, 89 Md. 602, the corporation which had issued preferred shares under the Act was in the hands of receivers. Pending the receivership, the buildings and a part of the stock in trade had been destroyed by fire; the receivers had collected the insurance money, together with some rents of the corporation's real estate and certain book accounts due for merchandise sold by it. The question was whether the funds in the hands of the receivers from these sources belonged to the preferred shareholders or to the creditors. It was held: (1) that the pre-

The Act of 1908,[1] is a substitute for the pre-existing statutory provisions as to preferred stock issued after June 1 of that year.[2]

§ 98. **The trust fund doctrine.** Before quitting the subject of capital stock as a legal conception, it is necessary to consider a theory which, having once flourished vigorously, is now moribund but not dead. In *Wood v. Dummer*, 3 Mason (U. S. C. C.) 308, decided in 1824, the shareholders of a bank whose charter was about to expire, had divided up the assets and thereby left the bank without means to pay certain outstanding notes held by the plaintiff. The latter filed his bill against the shareholders, alleging that the division of the assets was fraudulent; and the answers admitted the division but denied the fraud. A sufficient ground for the relief prayed, namely an accounting for the assets thus diverted, would have been this: that stock capital belongs to the legal entity and the shareholders have no right in it, until the corporation has been wound up and its debts paid; and that a shareholder who knowingly takes money that belongs, in the first instance, to creditors, must pay it back on their demand. The court, (Story J.) granted the relief prayed, but in the course of the opinion said: "It appears to me very clear upon

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ferred stock was entitled to priority only to the extent of the fixed property owned by the corporation at the time it was issued: (2) that it was not a lien upon subsequently acquired property: (3) and that the lien did not attach to the insurance money in the hands of the receivers, nor to the rents and book accounts collected by them.

[1] Quoted and discussed, *ante* § 41.

[2] Note a special provision for railroads: Code (1911) Art. 23, sec. 294.

general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public as well as the legislature, have always supposed this to be a fund appropriated for such purpose. * * * To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. * * * If I am right in this position, the principal difficulty in the cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any person having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretense to say that, both in law and fact, they are not affected with the most ample notice. The doctrine of following trust funds into the hands of any persons who are not innocent purchasers, or do not otherwise possess superior equities, has been long established."[1]

The rule thus announced by Judge Story was novel, but it found favor and was subsequently misapplied. Following the lead of the Supreme Court of the United States, the courts generally began to apply the trust fund theory in suits against shareholders for balances alleged to be due on their shares. If the subscriber had taken stock at less than par; or if, having subscribed at par, the corporation had contemporaneously agreed not to call for full payment; or if the corporation had subsequently agreed to release a subscriber from all or any part of his original subscription,—in

[1] In this opinion the term capital stock is used in the original sense of stock capital.

such cases the liability of the shareholder was rested upon the fanciful ground that, by the mere fact of share ownership, he became debtor to a trust fund of which the directors were the trustees and the creditors the beneficiaries. In *Sanger v. Upton,* 91 U. S. 56, the appellant was the holder of shares, not fully paid, in a bankrupt insurance company and, in a suit by its receiver, relied upon a resolution of the directors to the effect that no further calls should be made. The court, properly enough, held that unpaid subscriptions are as much a part of the stock capital as the cash which has been paid in upon them; and that where the rights of creditors are affected, the corporation can no more release a subscriber from his promise to pay than it can return him the money he has already paid. But it is further said: "An agreement that a stockholder may pay in any other medium than money is also void as a fraud upon the other stockholders, and upon creditors as well. * * * The capital stock is a fund set apart for the payment of debts. * * * The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice." In *Upton v. Tribilcock,* 91 U. S. 45, a case growing out of the same state of facts, the court went further. Here there was an agreement between the corporation and the subscriber, made at the time of subscription, to the effect that full payment for the shares should not be required. The question presented was not whether the corporation could release the subscriber from a promise he had made; but whether he could be sued upon a promise that he did not make. It was said that the agreement was void as to creditors and that "the accept-

ance and holding of a certificate of shares in a corporation makes the holder liable to the responsibilities of a shareholder" because "the capital stock of a moneyed corporation is a fund for the payment of its debts; it is a trust fund of which the directors are the trustees."

§ 99. **The present state of the trust fund doctrine.** First. So far as the relation of a creditor to the corporation's property is concerned, the notion that it is impressed with a trust for his benefit has been entirely abandoned. He has no lien of any sort. If, in fraud of creditors, the corporation conveys away any of its assets, whether they represent stock capital or free capital, the defrauded creditor may attack the conveyance or transfer just as he might do if his debtor were a natural person. But the success of such an attack will depend upon whether the grantee has guilty knowledge or is a volunteer; and not upon the fact that the subject matter is impressed with a trust. In *Hollins v. Briarfield Co.*, 150 U. S. 371, a simple contract creditor of a corporation was seeking to set aside a mortgage made by it, and to enforce the payment of stock subscriptions. Under the settled equity rule followed by the federal courts, a creditor may not attack a conveyance of his debtor unless he has a judgment or other lien on the property conveyed.[1] The plaintiff, however, rested his right upon the ground that the stock capital of a corporation constitutes a trust fund impressed with a lien in favor of its creditors. The court disposed of this contention as follows: "While it is true language has been frequently

[1] See the authorities collated in 20 Cyc. 683. The rule has been partly changed by statute in Maryland. Code (1911) Art. 16, sec. 47.

used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, Sec. 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.' A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity at the instance of the proper party, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. * * * When a court of equity does take into its possession the assets of an insolvent corporation it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to the property. * * * A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of

being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. * * * Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

In *McDonald v. Williams,* 174 U. S. 397, the receiver of an insolvent national bank was suing a shareholder to recover back a dividend paid him out of the stock capital. At the time the dividend was paid, the capital stock of the bank was impaired, but the corporation was solvent as to creditors; the directors knew this fact, but the shareholder did not. The national banking act provides that "no association or any member thereof shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital." It was urged on behalf of the receiver that the payment of the dividend was illegal and *ultra vires,* and that the money thus paid remained the property of the corporation and could be followed into the hands of any volunteer. But the court said: "There is no well defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of

the property. The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund and therefore were liable to be recovered back. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend in good faith, believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent." [1]

Second. In suits by or for the benefit of creditors, brought to recover payments alleged to be due on the shares, the trust fund doctrine is still invoked with more or less frequency. In *Crawford v. Rohrer,* 59 Md. 599, shares were issued to the defendant as fully paid, in exchange for property. The court found that even at the valuation placed upon it, the property did not equal the par value of the shares, and accordingly held the defendant liable for the balance. In the course of the opinion it is said: "It has been again and again decided, that the unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of the general creditors of the corporation; and that this trust cannot be defeated or the fund impaired by a simulated or pretended payment for the stock taken,

[1] Compare the provision for state banks and trust companies in Code (1911), Art. 11, sec. 68.

nor by any advice short of actual payment in good faith. Any arrangement, therefore, among the stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber."[1]

In this case, however, there was no question of a trust really involved. And when the court speaks of unpaid subscriptions constituting a trust fund, it means no more than to say that a subscription as a promise which must be performed in good faith; and which can not be released at the expense of creditors entitled to rely upon it.[2]

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[1] Compare the language in *Hooper v. Central Trust Co.*, 81 Md. 580 with that in *Fear v. Bartlett*, 81 Md. 443 and *Brant v. Ehlen*, 59 Md. 1.

[2] For a collection of authorities on the trust fund doctrine, see 10 Cyc. 653, &c.; *post*, § 110.

CHAPTER XV.

HOW THE RELATION OF SHAREHOLDER IS CREATED. SUBSCRIPTION.

§ 100. **How share ownership is acquired.** Unissued stock is not property, nor is it, theoretically, anything that the corporation can sell or pledge.[1] In the first instance it is merely a potentiality for raising the authorized capital; and a shareholder is one who has agreed to contribute a definite portion of this capital by subscribing for a definite number of the shares. The subscription contract creates the share; and, as thus created, it may pass by transfer, voluntary or involuntary, from one owner to another indefinitely. It follows, therefore, that so far as original stock is concerned, a shareholder must be either a subscriber or a transferee, mediate or immediate, from a subscriber.

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[1] Thomp. Corp., secs. 2051-2053. The distinction between a sale and a subscription, in the case of original stock, lies in the fact that, theoretically, original stock is always formative, and that the corporation does not own and has no power to dispose of such stock at less than par. A practical consequence of the distinction is this: in the case of a sale, *e. g.*, of increased stock, a tender of the certificate by the corporation and payment of the price by the purchaser are conditions precedent respectively to the obligations and rights of a shareholder. As to selling or pledging unissued shares, see *post*, § 106.

§ 101. **Subscription contracts generally.** Shareholding has elements of status; and there are some particulars in which an agreement to take shares presents exceptions to the well-defined principles of contract law. 1st. A subscription may be made before and in contemplation of incorporation. In such a case some courts hold that the doctrine of offer and acceptance governing the formation of an ordinary contract does not apply. 2nd. Within certain limits, the law and not the agreement of the parties, controls the terms, conditions and the manner of enforcing payment. 3rd. A subscription contract is construed, or more properly, the resulting status of the shareholder is determined, by the law of the corporation's domicil.[1] 4th. In favor of creditors the law infers the existence of the contract from the fact that the name of the alleged shareholder appears on the corporate books, and puts upon him the burden of proving that his name is not rightfully there.[2] The rights of creditors, moreover, may shut out defenses, such as fraud or misrepresentation, which would be available in the case of an ordinary contract. 5th. As between the corporation and the subscriber the latter may transfer to another, if legally capable of holding,[3] the rights and obligations resulting from the subscription contract. And, in the absence of good reason to doubt the solvency of the transferee, the corporation is bound, where there is no statutory or charter provision to the contrary, to accept and look to him for uncalled payments on the shares.

§ 102. **Preliminary subscriptions.** Frequently the

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[1] Compare *Pinney v. Nelson*, 183 U. S. 144.

[2] See, however, *post*, § 105.

[3] Compare: *Keyser v. Hitz*, 133 U. S. 138; *Kerr v. Urie*, 86 Md. 72.

agreement signed by the subscriber is to take shares in a proposed corporation; and, when suit on the agreement is brought by the corporation, the question arises, How can there be a contract with a non-existing party? The logical difficulty of the question has caused a variety of answers, and there are two views, among others, which may be called the principal ones.

By some courts it is held that a preliminary subscription is merely an offer which may be withdrawn at any time before the corporation comes into being and accepts. In *Bryant's Pond Steam Mill Co. v. Felt,* 87 Maine 234,[1] the appellee had agreed to take shares in a corporation to be thereafter formed. Before its actual formation, he notified the agent of the promoters through whom the subscription had been obtained, that he wished to withdraw; and this notice was communicated to the other subscribers at one of their meetings. The court said: "The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it. * * * With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers until the corporation has been organized and the subscriptions accepted, and that until then the subscribers have a right to revoke their subscriptions. And in

[1] 33 L. R. A. 593.

view of the fact that such subscriptions are often obtained by over-persuasion and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is."[1]

In the other view, logic is sacrificed to common sense. The subscriber is regarded as having pledged his faith to the co-signers, and without their consent he cannot withdraw. The corporation when formed cannot refuse to accept the subscriber; he is entitled to receive his shares; and he is bound to respond to calls for payment. In this view, subscription makes the shareholder; and neither a tender of the certificate nor payment is essential.[2] Of course, the subscriber is bound to make payments when and as they are duly called; and while in default, he may be deprived of his right to vote the share.[3] But the point for emphasis is that if the contemplated corporation is duly formed within a reasonable time, and in substantial accordance with the preliminary agreement, nothing more than subscription is necessary to make the subscriber a shareholder. In *Hughes v. Antietam Co.*, 34 Md. 328, the law is stated thus: "But it is further insisted that the appellant had the right to withdraw his subscription after the acknowledgment of the certificate before the justice of the peace, and at any time prior to its being recorded. We think, however, it is clear, both upon principle and authority, he cannot. As we have before said, the subscription is in itself a contract on the part of the appellant to pay for the

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[1] To the same effect is *Hudson Co. v. Tower*, 161 Mass. 10. For the opposing views see Thomp. Corp., secs. 1162 and 8606.

[2] *Railway Co. v. Hambleton*, 77 Md. 341.

[3] Code (1911) Art. 23, sec. 19.

shares thus taken in the manner and according to the terms prescribed by law, in consideration of which he acquired the right to demand the same upon the organization of the company and of which he could not be deprived either before or subsequent to the incorporation. The obligation to pay on the one hand and the right to demand on the other, created a mutuality of contract, binding as between the co-subscribers, the parties thereto, and could not be discharged by the act of one."[1]

§ 103. **Subscriptions after incorporation.** Where an agreement to take shares is or purports to be made with an existing corporation, the rule is different. The offer, whether made by the corporation or by the subscriber, must be accepted and is revocable until acceptance; and, moreover, there will be no contract unless both parties are competent to contract. In *Cleaveland v. Mullin,* 96 Md. 598, the appellant had made application for shares in a corporation which had been duly formed in all respects except that it had not paid its bonus tax; some days later he was notified that the shares had been allotted to him; and some days after the receipt of this notice he withdrew his application and asked to have the subscription cancelled. The company subsequently went into the hands of a receiver; the bonus tax was paid and suit was brought on the subscription. It was held that by reason of the non-payment of the tax, the corporation had no capacity to contract; that the appellant was not bound, because he had withdrawn his offer before it was legally accepted; and that the case was not to be governed by the rule applicable to subscriptions made prior to

[1] For a valuable collection of authorities see 33 L. R. A. 593 and 47 L. R. A. 246.

and in contemplation of incorporation. But, in cases of this character, the acceptance of dividends by the subscriber after the corporation has paid the bonus tax constitutes a ratification of the subscription, rendering it an enforceable obligation.[1]

§ 104. **Form and conditions.** A subscription, etymology notwithstanding, need not be in writing.[2] In the absence of some statutory or charter provision, neither payment, in whole or in part, nor the issue of a certificate is, in the case of original stock, necessary to create the status of stockholder with its attendant rights and liabilities;[3] moreover,

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[1] *Murphy v. Wheatley,* 102 Md. 501.

[2] 1 Thomp. Corp. secs. 1146-1147.

[3] This seems to be well settled by the authorities; but in the case of *Busey v. Hooper,* 35 Md. 15, there is language to the contrary. Here the appellants, claiming to be shareholders of the Citizens Railway, were attacking by injunction acts done at a meeting from which they were excluded. The subscription agreement which the appellants had signed, provided that as soon as two thousand shares had been subscribed, the signers should pay five dollars per share to the Company's treasurer. The instalment payment, although due, had not been made by the appellants, and the court refused the injunction. In the opinion it is said: "None of the cases decide that the mere fact of subscribing to the stock of an incorporated company constitutes the subscriber a stockholder, but that such subscription puts it in his power to become a stockholder, by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription." This would appear to be too broad a statement of the law, and as has been pointed out (1 Thomp. Corp. sec. 1139), the New York case cited as an authority for the proposition does not touch it. It is one thing to say that a delinquent subscriber has no standing in court, and no right to vote; but it is a different thing to say that where the subscription contract has been duly formed by offer and acceptance and no calls for payment have been made, a sub-

the subscriber may impose conditions which must be fulfilled before his offer becomes binding upon him. The earlier special charters usually named commissioners to receive subscriptions and provided (a) that intending subscribers should prepay some fixed percentage of the amount taken; and (b) that not until some fixed amount of the capital stock had been subscribed should corporate life begin. In such cases the courts held that the commissioners, having only a special authority, could neither waive the deposit nor accept conditional subscriptions; and that in either event there was no binding contract.[1] It was further held, however, that a different rule would apply to dealings with the corporation after its organization.[2] The following are the principles to be noted:

First. Except in the case of railroads, the general incorporation law does not require payment on account of subscriptions to be made at the time of subscribing. The provision for railroads (Code, 1911, Art. 23, sec. 265) is

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scriber is not entitled to the status of shareholder. *Busey v. Hooper* is cited with approval in *Railway Company v. Hambleton*, 77 Md. 341. The latter case, however, deals with increased stock,—as to which the rule is clear that payment by the subscriber and the tender of a certificate by the corporation are necessary to complete the status. Compare *Oler v. R. R. Co.*, 41 Md. 593, and *Webb v. R. R. Co.*, 77 Md. 92.

[1] *Bank v. Nelson*, 12 Md. 35; *Plank Road Co. v. Hoffman*, 9 Md. 568: "Commissioners are appointed to receive subscriptions to stock for the purpose of giving the subscribers a right to organize as a corporation under the charter. So soon, however, as the organization takes place, the authority of the commissioners ceases; and all corporate powers conferred by the charter vest in the body politic. Such, at least, is the general rule applying in every case where there is no special provision to the contrary."

[2] *Taggart v. R. R. Co.*, 24 Md. 563.

that "an instalment of five dollars in actual cash on each share of stock shall be payable at the time of making the subscription,"—but in *Oler v. R. R. Co.*, 41 Md. 593, it was held that this language does not import a condition precedent to the validity of the subscription.[1]

Second. A conditional subscription is a continuing offer which becomes binding on the performance of the condition. In *Webb v. R. R. Co.*, 77 Md. 92, the appellant had signed the following paper: "I hereby agree to take twenty shares of the Baltimore and Eastern Shore Railroad stock when completed to Vienna—$1,000." The road was completed to the point named but the subscriber refused to pay. The court first disposes of the defenses that no certificate had been tendered to the appellant and that he had not paid the instalment of five dollars at the time of subscribing, as required by the Code,—holding that neither tender nor payment was necessary to the validity of the subscription; and then it is said: "The subscription in the form in which it was made was inchoate and conditional. It was such, however, as the Company had a right to accept. It was simply a continual offer by the defendant to become a stockholder after the condition specified had been performed by the Company. The performance of the condition precedent on the part of the Company was necessary to a valid acceptance of the offer thus made by the subscriber; and before this acceptance by the performance of the condition precedent, the defendant did not by virtue of such subscription become a member of the Company. The subscription was a mere offer and unless withdrawn before the condition

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[1] Affirmed, *Webb v. R. R. Co.*, 77 Md. 92. The authorities are conflicting. See 10 Cyc. 395, 397.

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[1] Thomp. Corp., secs. 2051-2053. The distinction between a sale and a subscription, in the case of original stock, lies in the fact that, theoretically, original stock is always formative, and that the corporation does not own and has no power to dispose of such stock at less than par. A practical consequence of the distinction is this: in the case of a sale, *e. g.*, of increased stock, a tender of the certificate by the corporation and payment of the price by the purchaser are conditions precedent respectively to the obligations and rights of a shareholder. As to selling or pledging unissued shares, see *post*, § 106.

§ 101. **Subscription contracts generally.** Shareholding has elements of status; and there are some particulars in which an agreement to take shares presents exceptions to the well-defined principles of contract law. 1st. A subscription may be made before and in contemplation of incorporation. In such a case some courts hold that the doctrine of offer and acceptance governing the formation of an ordinary contract, does not apply. 2nd. Within certain limits, the law and not the agreement of the parties, controls the terms, conditions and the manner of enforcing payment. 3rd. A subscription contract is construed (or more properly, the resulting status of the shareholder is determined) by the law of the corporation's domicil.[1] 4th. In favor of creditors the law infers the existence of the contract from the fact that the name of the alleged shareholder appears on the corporate books, and puts upon him the burden of proving that his name is not rightfully there.[2] The rights of creditors, moreover, may shut out defenses, such as fraud or misrepresentation, which would be available in the case of an ordinary contract. 5th. As between the corporation and the subscriber the latter may transfer to another, if legally capable of holding,[3] the rights and obligations resulting from the subscription contract. And, in the absence of good reason to doubt the solvency of the transferee, the corporation is bound, where there is no statutory or charter provision to the contrary, to accept and look to him for uncalled payments on the shares.

§ 102. **Preliminary subscriptions.** Frequently the

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[1] Compare *Pinney v. Nelson*, 183 U. S. 144.

[2] See, however, *post*, § 105.

[3] Compare: *Keyser v. Hitz*, 133 U. S. 138; *Kerr v. Urie*, 86 Md. 72.

books of the corporation in which the name of the defendant was entered as the owner of fifty shares: (2) offered the stock book with a duplicate of the stock certificate issued to the defendant: (3) introduced testimony to prove that the certificate was sent to agents to be delivered to the defendant and that he paid twenty per cent of the shares: (4) introduced a receipt signed by the defendant showing that the company had paid him a dividend on his stock.

The doctrine is forcibly criticised by Judge Thompson[1] as follows: "Under this rule a number of adventurers can organize a real or pretended corporation and by opening a stock book and inserting thereon the name of one of the Judges so holding (this doctrine), charge him with a liability as a stockholder not only in favor of themselves but also in favor of their creditors. The true principle is that before the books of the corporation can be put in evidence against a person charged with liability as one of its members, his membership must be admitted or established by evidence *aliunde*,—a thing which is not difficult in view of the fact that his relation as stockholder can be shown by his conduct."

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[1] 6 Thompson Corporations, sec. 7732. Compare *Keyser v. Hitz*, 133 U. S. 138; *Foote v. Anderson*, 123 Fed. 659.

CHAPTER XVI.

LIABILITIES AND INCIDENTS OF SHARE OWNERSHIP.

§ 106. **Introductory** Some one with a turn for epigram has characterized a share of stock as a "collection of rights and liabilities." This is not the historical aspect, but it affords a helpful view of the modern conception and suggests a convenient mode of treating the subject.

In considering the situation of a shareholder from the point of view of his liability to the corporation and its creditors, attention must be re-called to certain previously noticed theories and notions of public policy which have largely molded the law. Some of these are obsolete, others are in various stages of obsolescence,—but they must all be taken into an account of the present situation, and in a measure. they serve to explain the conflict of opinion which it exhibits.

First. It used to be a prevalent opinion that the state, as the creator of corporations, was in some degree their sponsor, and owed to creditors the duty of securing by law the actual payment of the nominal capital stock. Almost universally, special charters and general laws made the subscription, and sometimes the payment of all or some part of the authorized issue, a condition precedent to either corporate existence or activity. This original or required issue was called by the courts "formative stock" and, inde-

pendently of statute, they formulated the still prevailing doctrine that, unless otherwise provided by the charter, every subscription is subject to the implied condition that all the original stock shall be taken. Moreover, in the nature of things, the corporation could not sell or pledge its formative stock. Selling and pledging not only involve the logical inconsistency of treating the corporation as the owner of its formative shares, but they also assume the right, directly or indirectly through the foreclosure of the pledge, to dispose of this stock at less than par. In recent times, however, the point of view has changed; notions of public policy have shifted; corporation laws do not as a rule make subscriptions a pre-requisite to corporate birth and activity; the courts have held that in the absence of statute, no such pre-requisite exists; and the term formative stock has lost much of its meaning.[1] Consequently and naturally, the idea has developed that the un-issued shares of a corporation which is a going concern are its property which it may pledge[2] and, under some circumstances, sell for what they will bring. And the earlier decisions, which had to do with forgotten theories, are sometimes misunderstood and misapplied.

Second. Inherent in the original conception was the obligation to pay for the stock in money. Very generally this obligation was imposed by statute,—as for example, the

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[1] See *ante*, §95.

[2] *Burgess v. Seligman*, 107 U. S. 20, approving *Matthews v. Albert*, 24 Md. 527, is usually cited for this proposition; but the actual point was not raised or decided. The real question in both of these cases was whether a pledgee, who was being sued for the liability of a shareholder, had ever contracted that status. See the cases cited in 2 Clark and Marshall, Corp., sec. 387, and notes.

Maryland Act of 1838, relating to manufacturing corporations, which provided that "nothing but money shall be considered as payment for any part of the capital stock;"[1]. but the courts treated the obligation also as a requirement of public policy. In *Sanger v. Upton,* 91 U. S. 56, an early Ohio case is quoted with approval as authority for the proposition that "An agreement that a stockholder may pay in any other medium than money, is also void as a fraud upon the other stockholders and upon the creditors as well." Here again the point of view has changed. If a going concern has unissued shares and needs property for which the owner is willing to take stock,—why should the money be passed back and forth? There is no reason why,—except that the average man will always sell his property cheaper for money than for shares and some over-valuation is inevitable. Accordingly, for years, statutes have permitted, under various restrictions, the payment for shares in what is called money's worth; and now many courts hold broadly that in the absence of prohibition in the written law, shares may be paid for in anything of value which the corporation is by its charter, authorized to acquire.[2]

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[1] By the Code of 1860 it was provided that mining corporations might accept lands in payment of capital stock. In *Basshor v. Dressel,* 34 Md. 503, the court held that leasehold interests were not lands within the meaning of the law.

[2] *Brant v. Ehlen,* 59 Md. 29; Noyes, Intercorporate Relations, 2 Ed. pp. 571 et seq: "Questions may arise as to the valuation of property taken, but the power of a corporation to agree with a subscriber to receive property in payment for stock cannot be questioned at the present day. * * * Statutes have been passed in many States authorizing corporations, under prescribed conditions, to accept property in payment of subscriptions. The conditions of such statutes are limitations upon the power of the corporation."

Third. Originally a share was an incident merely of membership status. It was not transferable as of right; nor did the possession of more than one share give a member more than one vote. Moreover the incidents of this status, and particularly the obligation to pay for the share its par value, could not be varied by contract. This theory, namely, that while the relation of shareholder is created by contract, its existence may be inferred from conduct and its obligations are fixed by law,—has had a wide influence. But here, too, has operated the general movement from status to contract which marks the history of all legal relations. The mere fact of membership in a stock corporation still raises the presumption of liability for whatever may remain unpaid on the shares standing in the member's name. But the courts (some slightly and others in a larger degree) have permitted the presumption to be met by proof of a special agreement between the corporation and the shareholder.[1]

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[1] *Brant v. Ehlen,* 59 Md. 1, was a creditor's suit against shareholders whose stock was not in fact paid up. They escaped because they had in good faith taken certificates stating that the shares were fully paid. In the course of the opinion it is said that "the liability for subscription to the stock of a corporation is founded upon contract." Such a statement, if limited to suits between the corporation and the shareholder, represents the position the courts have reached; unless so limited, the statement is broader than the case required or the court intended. The rule, if limited to parties with notice, would be accurately expressed in *Crawford v. Rohrer,* 59 Md. 604: "Any arrangement therefore among the stockholders or those in charge of the affairs of the corporation by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham and not as a valid payment as against the creditors of the corporation. As between the creditors of the cor-

§ 107. **What the liability of a share is.** If you objectify a share and say that, upon being taken, it becomes debtor to the stock capital for its par value, payable as called; that this obligation cannot be impaired or released; that it shifts by transfer from owner to owner and attaches to the person who is shown by the corporate books to be owner (as distinguished from a pledgee or fiduciary) at the time a call for payment is made,—then you have stated in broad outline what, for convenience merely, may be called the original liability of a share, in the case of a normal subscription. The right to collect this liability is always and only in the corporation or its liquidator,—whether assignee, trustee or receiver. The limit of the liability is always the difference between what the share has paid and its par value. The person liable in respect of the share is the book owner at the time payment is duly called.[1] After the share has paid its par value into the stock capital, it is quit,[2]—unless some governing statute imposes an extra liability. Such extra or statutory liability was universal once, and restricted to certain classes of corporations, is common still; and the extent of the liability and the persons by and against whom it may be asserted are determined by and vary with the provisions of the several statutes.

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poration and the original holders of the stock, it in no manner affects the rights of the former if the stock has been issued as fully paid-up; for their rights depend not upon the mere appearance of things, but upon the actual *bona fide* payment by the stockholder whether that payment be alleged to have been made in money or property."

[1] See *post*, § 117—Novation.

[2] The corporation has no *inherent* power to levy assessments on full-paid shares; and this is true whether the certificates are marked "non-assessable" or not. For the case of national banks, see *Bank v. Weinhard*, 192 U. S. 243.

More remains to be said about the original liability, and afterward that imposed by statute will be considered.

§ 108. **The medium and quantum of payment.** There were, as we have seen, two conditions that the policy of the earlier law, as expressed in the statutes, did not contemplate: Payment for shares in any other medium than money or at any other rate than par. Along lines of departure from these two positions, a bewildering conflict of decisions has proceeded. Anticipating and outlining for the sake of clearness the discussion in the following sections, it may be said, with substantial accuracy, that the weight of authority establishes the following propositions: (1) It is still the *rule,* to which any judicial or statutory modifications are *exceptions,* that the share owes to the stock capital its par or nominal value in money or money's worth. (2) Where shares have been paid for at par in money, there exists no further liability, unless the corporation belongs to one of the few and special classes upon the stock of which an extra liability in favor of creditors is imposed by statute. (3) Where shares have been paid for in money's worth, then, if the relevant statutes have been complied with: and if the payment is fairly equal to the *par* value of the shares taken,—the result is as in (2) above. (4) If by agreement between the corporation and the subscriber (there being no fraud on existing stockholders[1]) shares have been issued for less than their par value, and whether the payment is in money or money's worth,—the transaction is good as between the corporation and the subscriber. In

[1] As to subsequent stockholders, see *Tompkins v. Sperry,* 96 Md. 560; *Old Dominion Copper Co. v. Lewisohn,* 210 U. S. 206,—with which compare *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111; and note distinction taken in *Davis v. Las Ovas Co.,* 227 U. S. 80,—where some of the promoters had deceived the others.

the absence of special circumstances (as to which the decisions differ), the transaction is not good if (and to the extent that[1]) it becomes necessary to collect the difference between the actual payment and the par value of the shares for the purpose of paying creditors. (5) Generally, a person who takes in good faith a certificate stating that the shares are full paid, is exempt from further calls whether by the corporation or by creditors;[2] nor is there any reason why the same result should not follow if the shares are in good faith bought as full paid, whether the certificate so states or not. (6) If the transaction is voidable because the payment, whether in money or money's worth, was not fairly equal to the par value of the shares,—it is only a subsequent creditor who can complain.[3]

§ 109. **Payment in property.** We have seen that in *Sanger v. Upton*, 91 U. S. 56, the court says: "An agreement that a stockholder may pay in any other medium

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[1] *Hughes v. Hall*, 117 Md. 553.

[2] *Brant v. Ehlen*, 59 Md. 1.

[3] The propositions in the text may be varied by statutes imposing a different liability for watered stock. See *post*, Statutory Liability, § 118. Under the trust fund theory it would logically make no difference whether the creditor became such before or after the stock not fully paid was issued. The now prevailing theory bases the stockholder's liability upon a combination of two principles: (1) An implied representation or holding out on the part of the shareholder that issued stock is fully paid. (2) A presumption that the creditor knows what the corporate books would show and relies upon the nominal capital as security. On this theory, the creditor who became such prior to the issue has no grievance, because he has not been injured. See *Handley v. Stutz*, 139 U. S. 417; *McDonald v. Williams*, 174 U. S. 397; and compare *McDonald v. Dewey*, 202 U. S. 510; *Magruder v. Colston*, 44 Md. 356; *McKim v. Glenn*, 66 Md. 484; *Kerr v. Urie*, 86 Md. 79.

than money is also void as a fraud upon the other stockholders and upon creditors as well." This is rather fanciful; because, if the property is suitable for the corporate purposes, there can hardly be any fraud, *per se,* on either stockholder or creditor, in accepting such property in lieu of money. But whether regarded as enlarging or restricting the common law powers of a corporation, the fact is that statutes in most of the states regulate the subject; and only in conformity with their provisions is payment in money's worth a valid payment. The provisions of the Maryland Act of 1908, Chapter 240 (Code 1911, Art. 23, secs. 35 and 36), are sufficiently typical:

Sec. 35. Any corporation of this state may issue stock, preferred or common, for services or for property of any description: provided (1) that such services are rendered to or adopted by said corporation; (2) that the property is suitable for any of the purposes for which the corporation was formed; (3) that the value of such services and property, and the propriety of issuing stock therefor, shall be agreed upon and the issue authorized by the affirmative vote of a majority of all the stock (or if two or more classes of stock have been issued, of a majority of each class) outstanding and entitled to vote, given at any meeting duly warned as provided for by Sections 15 or 16 of this Article; and (4) that in counting the majority of the outstanding stock necessary to authorize the issuance of stock for services or property under this section, no stock shall be counted whose owner or holder is interested in such services or property, nor any stock that has merely been subscribed for, and payment for which is to be made in services.

Sec. 36. Whenever the stock of any corporation is issued for services or property, in accordance with the preceding section, the books of the corporation shall be so kept as to show at all times fully what property was received and what services were rendered for the said stock; at what value, and the number of shares issued for the same. Whenever any stock is issued in payment for services or property, as aforesaid, a certificate, signed by the president or vice-president and secretary and sworn to by the treasurer, setting forth the amount of stock so issued and the property or services in payment for which said stock is issued, and particularly specifying the nature and character of such property or services, shall, within thirty days after the issue of said stock, be filed in the office of the clerk of the Circuit Court for the county in which the principal office of the corporation is located (or of the clerk of the Superior Court of Baltimore City, if such principal office is located in Baltimore City), and any officer or director of such corporation wilfully and knowingly authorizing or consenting to the failure to so file such a certificate within thirty days from the issue of said stock, or wilfully and knowingly making or consenting to any false statement contained in the entries required by this section to be made on the books of the corporation, or of said certificate, shall be deemed guilty of a misdemeanor, and upon conviction, shall be subject to the pains and penalties prescribed by Section 134 of Article 27 of the said Code of 1904. Provided, however, that the valuation placed by the stockholders upon such services or property at the meeting duly warned, as aforesaid, and the propriety of their action in accepting the same and issuing the agreed number of shares therefor, shall in

the absence of actual fraud be conclusive against and binding upon any and all creditors of the corporation.[1]

§ 110. **Over-valuation.** It is usually in the inception of a corporate enterprise that the transaction takes place out of which arises the question as to the equivalence of the par or nominal value of the stock and the money's worth given therefor. Usually the acquisition of certain property is one of the purposes for which the corporation is formed, and the owners and the promoters are working together. After incorporation is accomplished, three or more persons, of any sort or condition, will subscribe each for a share of stock; then they will assemble in stockholders' meeting, notice being waived by actual attendance; the offer of the owner of the property will be submitted, and accepted as made; and the thing is done. When bankruptcy ensues, creditors begin a belated inquiry into the value of the property for which the shares were issued. The result sometimes depends upon the wording of particular statutes; sometimes upon general principles; and sometimes upon a fusion and confusion of both:

First. In every case the first question is whether the property (including any other permissible form of money's

[1] For the former laws, see *Miller v. Cosmic Cement Co.*, 109 Md. 17. In this case the directors undertook to exercise the power which the statute vests in the stockholders. The court said: "It was beyond the power of the appellee to make a valid contract to receive property of any kind in payment for any part of its capital stock in plain violation of the express conditions imposed upon it." For a special provision as to railroads, see Code (1911), Art. 23, sec. 294. Note that the Maryland statute does not treat good will as money's worth. In the absence of statutory restriction, there is no reason why good will should not be considered property; but see *Camden v. Stuart*, 144 U. S. 115.

worth) is such as the corporation may lawfully acquire, regard being had to the chartered purposes.

Second. Where no statute controls, the courts are divided between what have been called the "true value" rule and the "good faith" rule. The former test is simple but unreasonably harsh, namely: whether the actual value of the property equals the par or nominal value of the shares.[1] The latter test is, whether the over-valuation is so excessive as to make the transaction fraudulent. Allowance is made for the vanity of human expectations. A patent, for example, which is valuable if valid, may turn out by the decision of a divided court to be an infringement, and therefore worthless; but so, usually, will be the stock given for it.[2] Where the matter is regulated by statute, there is usually a provision that the judgment of the directors or the stockholders, as the case may be, in passing upon the questions of suitability and value,—"shall, in the absence of actual fraud, be conclusive against and binding upon any and all creditors of the corporation."[3] The construction of

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[1] See *State Trust Co. v. Turner,* 111 Iowa 664, 53 L. R. A. 136, in which the cases are reviewed. In this case, ninety thousand dollars of full paid stock was exchanged for some patents which were believed to be valid, but turned out to be worthless; and it was held that the shares were not paid for. See also, 10 Cyc. 473.

[2] *Tompkins v. Sperry,* 96 Md. 580; Coit v. Gold Amalgamating Co., 119 U. S. 343: "There must be actual fraud in the transaction to enable the creditors of the corporation to call the stockholders to account. A gross and obvious over-valuation will be strong evidence of fraud." For a comprehensive treatment of the subject, see 10 Cyc. 475. When the contract is executed by the transfer of the property and issue of the stock, the corporation is estopped from setting up the invalidity of the transaction. *Weber v. Fickey,* 52 Md. 516. See also, 19 L. R. A. (N. S.) 115.

[3] Code 1911, Art. 23, sec. 36.

this and similar provisions varies with the point of view of the different courts.[1]

§ 111. **Discount and bonus shares.** On this subject the development of the law has been gradual and interesting. You start with a theory which is more often assumed than expressed in the early decisions: A charter confers upon the incorporators immunity from personal liability for the debts of the corporation; there is an implied obligation therefore that as a substitute for this personal liability, the authorized capital stock will be filled up. But this obligation is easily evaded if the shares may be issued for less than their par value; and accordingly, you have the theory that such a proceeding is *ultra vires*.[2]

Then comes a modification. If there has been an express agreement that the par value of the shares shall not be called; and if this agreement involves no violation of any statute, and no fraud upon other shareholders,—why should it not be respected if the rights of creditors are not concerned? And so it is held. In *Scovill v. Thayer*, 105 U. S. 143, after the subscribers had paid in twenty per cent. it was agreed between them and the company that no further calls should be made; and certificates for full paid shares were issued. Upon the bankruptcy of the company it was held that the agreement between the company and its stockholders was void as to creditors. But the court further said: "The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further

[1] *Post*, § 118.

[2] 2 Thompson Corp., sec. 1564

assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the Company and its stockholders was just as binding as if it had been expressly authorized by the charter. If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount,' according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the Company. In fact, it has been held in recent English cases that not only is the Company but its creditors also, are bound by such a contract. But the doctrine of this court is that such a contract though binding on the Company is a fraud in law on its creditors, which they could set aside; that when their rights intervene and their claims are to be satisfied the stockholders can be required to pay their stock in full. In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing and he owed the Company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the Company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action

at law would lie to recover the unpaid balance due on the stock until this was done."[1]

In *Handley v. Stutz,* 139 U. S. 417, the court went a step further. A corporation engaged in coal mining was going upon the rocks and it was determined to increase the capital stock and issue bonds. Some of this increased stock was distributed among the original shareholders as a gift, and the rest of it was given to the bond subscribers as a bonus. The corporation finally went down and a bill was filed by creditors to have the shares paid up. The evidence was "that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith and considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable." The court said: "With regard to the original stockholders who voted for this

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[1] The reference to the English authorities is unfortunate, because they rest entirely upon the peculiar provisions of the Companies Act. In *Brant v. Ehlen,* 59 Md. 27, and in *Pittsburg Steel Co. v. Baltimore Equitable Society,* 113 Md. 77, it is said that the right of the creditors to recover against the stockholders is one founded on contract. The statement is strictly accurate only in this sense: Unless the relation of shareholder exists between the corporation and the defendant, it does not exist between the latter and the creditor. The creation of membership status is always the result of contract, but when the status exists, creditors may have rights which the corporation—the other party to the contract—could not assert. See *Crawford v. Rohrer,* 59 Md. 599; *Hooper v. Central T. Co.,* 81 Md. 580, 29 L. R. A. 262; *White v.* Hook, 87 Md. 733; *Hughes v. Hall,* 117 Md. 553; *Trent Import Co. v. Wheelwright,* 118 Md. 249. *Scovill v. Thayer,* is cited with approval, but not for the point made in the text, in *Glenn v. Williams,* 60 Md. 93 and *Hambleton v. Glenn,* 72 Md. 351. It is not necessary in Maryland to have the agreement between the corporation and the stockholder formally set aside. Code (1911), Art. 23, sec. 66.

increase of eight hundred shares and then distributed among themselves three hundred of those shares, without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value. The only claim made upon their behalf is that they never agreed to contribute or pay for the same; that the stock was expressly declared to be 'fully paid' and 'free from all claims or demands upon the part of the company;' that there was no evidence that the creditors of the company knew of, or relied upon this increase, in their dealings with the company; and that they had a right to return and surrender the same which they offered to do. There is no reason to suppose that these stockholders did not act in good faith and in the belief that they were entitled to this stock. The fact that they did not subscribe for it or agree to take it until the receipt of the certificates is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par value. The law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors. * * * If it be once admitted that a corporation may issue stock without receiving a consideration therefor and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be 'watered' except the caprice of the stockholders. While an agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors." As to those who had subscribed for the bonds and received the stock as a bonus the court said: "The case then resolves

itself into the question whether an active corporation, or as it is called a 'going concern,' finding its original capital impaired by loss or misfortune may not for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The question has never before been directly raised in this court and we are not consequently embarrassed by any previous decision on the point. The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which and the purposes for which such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original stock. But we think that an active corporation may for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue new stock and dispose of it for the best price that can be obtained. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds and was taken by the subscriber to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained and that the defendants cannot be called upon to respond for the par value of such stock as if they had subscribed to the original stock of the company." The Chief Justice, with whom Mr. Justice Lamar concurred, dissented on the ground that there was no actual payment of the bonus stock and that: "when the capital stock of a corporation

has become impaired or the business in which it is engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk." It will be perceived that in this case the court draws a distinction between original and increased stock; and between an increase made for the purpose of saving the enterprise and one issued for the purpose of extending the business. The latter distinction can hardly be said to be founded on principle; but if you adopt it, there is no apparent reason for distinguishing between the case of increased stock and unissued shares of the original authorized issue. And so in *Clark v. Bever,* 139 U. S. 96 (decided at the same term with *Handley v. Stutz*), it was held that a railroad company whose original stock had no market value, could issue it as full-paid at the rate of twenty cents on the dollar, in discharge of its indebtedness to a construction company; and that a holder of this stock with notice, could not be called upon by creditors to pay the remaining eighty per cent.[1]

§ 112. **Summary.** Watered stock is a short phrase for shares issued as full paid which have not contributed to the stock capital their par or nominal value in money or money's worth. The subscriber, and the subsequent holder with knowledge, have the burden of showing, in case of attack, why they should not be held for a liability

[1] Statutes usually provide a method by which the corporation, when its capital stock has become impaired, may reduce the nominal value to the actual value. See *ante,* § 40. For a criticism of *Handley v. Stutz,* see 2 Thompson Corp. secs. 1579, 1586 and 1665. This case is cited with approval on the question of liability for stock which is a mere gift, in *Hooper v. Central Trust Co.,* 81 Md. 581.

which they did not intentionally assume. And in the somewhat hysterical treatment which the subject has received in some jurisdictions, conclusions of fact, well enough in the particular cases in which they were announced, have been followed in subsequent cases as universal principles of law. Limited to the initial issue, which may properly be assumed to be worth par, the rule is sound, namely: that unless the creditor has actual or record notice to the contrary, he may rely upon the presumption that the shares outstanding are or will be represented by their equivalent, paid or promised. But where a going concern with unissued shares, worth less than par, needs money or property, there is no discernible sense in penalizing a subscriber who pays in money or in property at a fair valuation, not the nominal but the actual value of the shares. And a rule of law which produces such a result rests upon no sound principle and works an unnecessary hardship upon innocent parties. Where shares are issued for property in lieu of money, dissenting stockholders may always attack the transaction for actual fraud; and existing creditors are not injured because, whatever may be received by the corporation,—they are that much to the good. Subsequent stockholders may always, by inquiry before investing, learn how the shares have been paid for; so can an intending creditor: and the notion that, in giving credit, he relies upon any equivalence between the par value of the stock and the payment therefor,—is usually a fiction.[1] And where a gov-

[1] See *Fogg v. Blair*, 139 U. S. 118; *Clark v. Bever*, 139 U. S. 96; *Thompson-Houston Electric Co. v. Railway Co.*, 54 Fed. 1001; *Tompkins v. Sperry*, 96 Md. 581; *Brant v. Ehlen*, 59 Md. 29; and the note to *Security Trust Co. v. Ford*, 8 L. R. A. (N. S.) 263. See also an article in xxii Harvard Law Review 319 by G. W. Wickersham, then Attorney-General of the United States: "In the case

erning statute (such as that of Maryland, presently discussed) makes the issuance of stock for property a matter to be passed upon by disinterested shareholders; and provides for a public record of the details of the transaction,—in such a case there is no unfairness in holding that subsequent stockholders and creditors alike are bound, even when the stock issued for property is the initial issue.

§ 113. **By and against whom the liability for watered stock may be asserted: The extent of the liability: Limitations: Set-off.** Apart from statutory provisions and saving always the case of a purchaser of shares purporting to be full paid, who has no knowledge that they are not such,[1]—the debtor to the fund is the registered holder when contribution is required. Of course, in the case of a transfer and registration made with a fraudulent intent to escape liability, the true owner and not the registered holder may be held. The right to collect resides in

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of corporations operating public utilities, the public has undoubtedly a legitimate interest in the amount of capital stock which may be issued and the value placed by the organizers upon property acquired as a basis for stock issued, because the reasonableness of rates charged the public for the use of the utilities operated may depend to some extent upon the actual amount of legitimate capital invested in the enterprise, and upon which the corporation has concededly the right to earn a fair return. But, *a priori*, there would seem to be no reason why the incorporators of an ordinary trading or business corporation should not ascribe any value they please to property with which they propose to engage in business, for the purpose of fixing the amount of the capital stock; nor why they should not give an interest in that capital, by the issue of certificates representing shares therein, to those who may have promoted or brought about the organization, so long as they do not deceive the public or those who may have to deal with the company, either by misrepresentation or suppression of the facts."

[1] *Brant v. Ehlen*, 59 Md. 1.

the receiver or liquidator, who, by collecting, creates a common fund for the benefit of all the creditors entitled. Where, however, the subject is dealt with by statute, rights may be vested in the creditors severally, and this was formerly the case in Maryland.[1] Only creditors who become such subsequent to the issue can participate, because they only are presumed to have acted upon the implied representation.[2] The extent of the liability, if any exists, will be the amount needed, after the assets of the corporation have been exhausted, to pay the subsequent creditors,—but not exceeding the amount of water in the stock.[3] Sometimes a corporation undertakes to release an existing shareholder from part of his unpaid subscription; and sometimes by agreement he is released altogether and eliminated from the list of shareholders. Existing creditors may complain of both transactions, because as to them it may be the case of a voluntary gift of corporate assets. Subsequent creditors cannot complain of the second transaction, because they have not been misled thereby;[4] but as to them, the first will present a real case for the application of the strict rule against watered stock. As the transaction is good between the corporation and the subscriber, the statute of limitations will logically run from the time the demand on behalf of the creditors is made. And since the fund

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[1] *Post*, § 121.

[2] *Handley v. Stutz*, 139 U. S. 417; "We have no doubt the learned crcuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock." See also, *Magruder v. Colston*, 44 Md. 356.

[3] *Hughes v. Hall*, 117 Md. 547.

[4] Compare: *McDonald v. Dewey*, 202 U. S. 510.

collected is for the common benefit of the creditors entitled, a stockholder-creditor cannot set off a debt due him by the corporation against the debt due by him to the common fund.[1]

§ 114. **Calls.** Dealing now with cases of normal subscription, that is to say, where there has been no agreement to pay for the shares otherwise than in money at par,—the subscription creates membership status and the law imposes an obligation to pay when and as calls are duly made; and this is so even where there is no express promise to pay.[2] Conversely, where there is no agreement to pay at specified times, it is the call and not the subscription that creates the debt. Therefore, however old the subscription contract may be, limitations do not begin to run in favor of the shareholder until the call is made;[3] nor will a prior discharge in bankruptcy affect the liability where such discharge operates only "upon such debts which were proved or were provable against the insolvent estate"[4] but otherwise where the discharge covers "all debts and contracts made before the filing of the petition."[5]

Within the limits of any governing statute, the contract or a by-law[6] may fix the times and amounts of the instalment payments; and where there is no statutory provision, contract or by-law, the directors have discretionary power to

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[1] § 115, *post.*

[2] *Hughes v. Antietam Co.,* 34 Md. 327,—discussing the New England rule, namely, that in such a case the only remedy against the delinquent subscriber is the forfeiture or sale of his stock.

[3] *Glenn v. Williams,* 60 Md. 122.

[4] *Glenn v. Howard,* 65 Md. 40.

[5] *Glenn v. Clabaugh,* 65 Md. 66.

[6] *Morrison v. Dorsey,* 48 Md. 461.

make calls. The provisions of the Maryland statute are typical and are as follows (Code 1911, Art. 23, sec. 61):

"Unless otherwise payable by the subscription contract, the directors of any corporation having a capital stock, may call in and demand from the stockholders the amounts due on their subscriptions at such times and in such payments and instalments as the said directors shall deem proper; but at least thirty days' written or printed notice of the amount, time and place of payment of such calls shall be given to each stockholder; such notice shall be delivered to each stockholder by leaving the same with him, or at his residence or usual place of business, or by mailing it, postage prepaid, and addressed to him at his address as it appears upon the books of the corporation."[1]

§ 115. **Calls for the benefit of creditors.** Being an asset of the corporation, the right to call for further payments passes to its receiver or liquidator. Subject to the rule forbidding fraudulent and colorable transfers (*post*, §117), the person liable is the shareholder of record when insolvency intervenes. The amount collectible is determined by the court of the corporate domicil administering the assets; such court succeeds to the power of the directors to make calls; and its order is binding upon all stockholders, resident and non-resident, whether parties to the suit or not.[2] The amount collectible will depend upon the excess of corporate debts over assets, and will, of course,

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[1] For the law prior to the Act of 1908, see *Hughes v. Antietam Co.*, 34 Md. 331; *Scarlett v. Academy of Music*, 43 Md. 203 and 46 Md. 150.

[2] *Glenn v. Williams*, 60 Md. 93; *Crawford v. Rohrer*, 59 Md. 599; *Hall v. Insurance Co.*, 5 Gill 484; *Glenn v. Liggett*, 135 U. S. 533. And compare *Williams, Receiver, v. Watters*, 97 Md. 113.

be limited to the difference between the amount paid in on the share and its par value. A creditor-shareholder cannot set off his claim against the amount due by him to the common fund.[1]

§ 116. **Forfeiture of shares.** This right is purely statutory; unless otherwise provided, it is alternative with suit and not cumulative; and, when duly exercised in good faith, the status of shareholder, with its rights and liabilities, is terminated. The corporation thereupon becomes the owner of the share, and may dispose of it as property acquired in the ordinary course of business. The provisions of the Maryland statute (Code 1911, Art. 23, sec. 62) are as follows:

"When any stockholder fails to pay any instalment or call upon his stock which may have been properly assessed thereon by the directors, at the time when such payment is due, the directors may collect the amount of such instalments or call or any balance thereof remaining unpaid, from the said stockholder by an action at law, or they shall sell at public sale such part of the shares of such delinquent stockholder as will pay all assessments then due from him with interest and all incidental expenses, and shall transfer the shares so sold to the purchaser, who shall be entitled to a certificate therefor. Notice of the time and place of such sale and of the sum due on each share shall be given by advertisement for three weeks successively; once in each week before the sale, in a newspaper of the county or city where the principal office of said corporation is located in

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[1] *Sawyer v. Hoag*, 17 Wall. 610; *Cahill v. Original &c. Asso.*, 94 Md. 355. The rule of course is otherwise where the corporation, as a going concern, is suing for an unpaid instalment.

this State, and such notice shall be mailed by the treasurer of the corporation to such delinquent stockholder at his last known postoffice address at least twenty days before such sale. If no bidder can be had to pay the amount due on the stock, and if the amount is not collected by an action at law, brought within the county or city where the principal office of said corporation is located within six months from the date of the bringing of such action at law, the said stock shall be forfeited to the corporation and the amount previously paid in by the delinquent on the stock shall be forfeited to the corporation."[1]

§ 117. **Novation.** When share-owning was merely an incident of membership, a member could not, as a matter of right, assign his subscription or his share and thereby put the assignee in his place. Afterwards the point of view changed: share property became alienable as a matter of right; attempted restrictions on alienation were treated as contrary to public policy and void,—at least as against assignees without notice; and it became the rule that the assignee, if under no disability, is entitled to a transfer and registration on the corporate books, i. e. membership.[2] And this is the law today except where, by statute, restrictions

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[1] This section differs from that contained in the original draft of the Act of 1908, and is not happily conceived or worded. See, generally, *Murphy v. Patapsco Insurance Co.*, 6 Md. 99; *Maryland Agric. College v. R. R. Co.*, 43 Md. 439; and cases collected in the notes in 27 L. R. A. 305; 47 L. R. A. 251.

[2] *Post*, Chapter XVII—Transfer of Stock. In the early charters it was thought necessary to provide that "stockholders shall be members, and every person, having transferred his stock shall cease to be a member." See Maryland Act of 1809, ch. 163: Charter of the "Washington Cotton Manufacturing Company of the City of Baltimore."

on alienation are permitted.[1] The assignee, when registered, succeeds to all the rights and liabilities of the subscription contract, including the liability for future calls. Where, however, the corporation is in failing circumstances, a transfer with intent to escape liability is voidable as to creditors.[2] On the other hand, a transfer in good faith works a novation; but in this connection transfer means some entry on the corporate books showing the substitution. Until this is done, the registered holder remains liable for calls.[3]

§ 118. **The statutory liability. Watered stock.** In the absence of a statute to which the holder can lawfully be deemed to have assented, a share never owes to the stock capital more than its original or subscription liability, that is to say, the par value in money or its equivalent; and, furthermore, as we have seen,[4] there are courts which, in

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[1] As in Maryland: *ante*, § 21-(e),—with which compare the provisions of Code (1911), Art. 23, secs. 33 and 52. These sections provide that all restrictions upon the transfer of shares must be stated on the share certificate.

[2] *Rider v. Morrison*, 54 Md. 444. See also: *post*, § 119 and Cook Corporations, 6th Ed. sec. 263. For an exceptional case see *Magruder v. Colston*, 44 Md. 349.

[3] *Magruder v. Colston*, 44 Md. 349; but he may show that the failure to make the transfer was the fault of the corporation—*Whitney v. Butler*, 118 U. S. 655; *Earle v. Carson*, 188 U. S. 42; and *post*, § 119. For the effect of transfer upon the statutory extra liability, see the next succeeding sections. The Uniform Stock Transfer Act (Code 1911, Art. 23, sec. 40) provides that "Nothing in this Act shall be construed as forbidding a corporation (a) to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote as such owner, or (b) to hold liable for calls and assessments a person registered on its books as the owner of shares."

[4] *Ante*, § 110, 111.

the absence of controlling statutes, will, in cases of watered stock, limit this original liability of the share by applying the "good faith" rule: the doctrine of "holding out," and the defense of "purchaser without knowledge." Outlining the discussion in this and the following sections, it may be said: (1) Except where the aim of the statute is merely to ensure payment for the share at par, statutory is *extra* liability; and it is collectible regardless of whether or not the shares are in fact full paid. (2) Statutes sometimes authorize a corporation, which is a going concern, to make good an impairment of capital stock by assessing even the full-paid shares;[1] but, normally, the extra liability is collectible only when and to the extent that the corporate assets, upon insolvency, are insufficient to pay creditors. (3) The statute law governing shares and their liability, is that of the state creating the corporation; shareholders residing in other states are bound by this law; and in a special case it has been held that they may be bound by the law of the state where the principal business of the corporation is, under its charter, to be done.[2] Something will be said generally about statutes which aim merely to ensure full payment of the stock; next will be taken up, as typical, the extra liability in favor of creditors imposed upon shareholders in national banks; and finally the statutory law of Maryland will be considered.

Ensuring full payment of capital stock. Two types may be mentioned: (a) The former statute of Virginia, construed in the numerous *Glenn* cases hereinbefore noted.[3]

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[1] There is such a provision in the national banking act,—for which see *Bank v. Weinhard,* 192 U. S. 243.

[2] *Pinney v. Nelson,* 183 U. S. 144 and *post,* § 131.

[3] *Ante,* § 115, and *post,* Chapter XVII—Transfer of Stock.

Here the purpose and effect were to abrogate the doctrine of novation, by providing that even a *bona fide* transfer of shares should not absolve the transferor from liability for future calls. (b) The existing law of New Jersey which, as construed by the courts of that state, abrogates, in the case of watered stock, the good faith rule and the general principle that a creditor who has prior notice, actual or constructive, of the transaction, cannot afterwards complain that the actual value of property received in payment was less than the par or nominal value of the shares. The New Jersey statute provides, in effect, that the judgment of the directors on the question of valuation, if exercised in good faith, shall be final. In *See v. Heppenheimer,* 69 N. J. Eq. 36, the promoter of the corporation had acquired some thirty-nine different plants for the manufacture of straw paper, at an aggregate price of two and a quarter millions of dollars. These were turned into the corporation for shares at the par value of five millions. In a suit by the receiver against a stockholder with knowledge, the contention was that the profits resulting from economies brought about by consolidation could be capitalized, and that there had been no bad faith or actual fraud upon the part of either the directors who fixed the value or the stockholders who took the shares. The court said: "Nor is it necessary that conscious over-valuation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly warped by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motive." In

Easton National Bank v. American Brick and Tile Company, 70 N. J. Eq. 732, and reported with notes in 8 L. R. A. (N. S.) 271, a promoter-creditor, who had himself taken a large part of the watered stock, was seeking, in liquidation proceedings, to make his fellow adventurers pay the difference between the value of the property and the par of the shares. It was held that the New Jersey statute, properly interpreted, superseded both the good faith rule and the rule that a creditor with prior notice cannot complain; and that the statute absolutely prohibits "agreements for the issue of stock for a less consideration than its par value" and affords relief "to all creditors without distinction."

Limited to public service companies; and, in other cases, to the initial issue of stock, where no public record is required showing what property has been received and how much stock has been given therefor,—there is sound sense in the decision. But applied universally the rule is too broad and works more injustice than it prevents. As has already been shown, the theory of the earlier law practically prevented the exercise of corporate powers until the authorized stock was taken and paid for. If it were practical or desirable to revive this theory, the prospective creditor would be sure that the corporation had once started with a given capital in money or money's worth; but such knowledge would be no practical basis for a present credit. He would still be concerned with the question of mortgage and other indebtedness, and would do what he now does in a doubtful case when credit is asked,—get the commercial rating of the intending debtor. And just as the creditor is charged with record notice of mortgages and other liens, so he ought to be bound where the transaction showing payment in property has been made a matter of public record. Except

where the number of shares issued has some bearing on prices, the public is not interested in their nominal value; and where the stock of a going concern needing money or property is worth less than par, no sound principle of public policy is expressed by the rule which forbids the issue of such stock at its real value.[1]

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[1] Recently (February 19, 1913, and since the decisions noted in the text), the New Jersey statutes have been amended. The relevant provision, not clearly worded, is as follows:

"Any corporation formed under this act may purchase property, real and personal, and the stock of any corporation, necessary for its business, and issue stock to the amount of the value thereof in payment therefor, subject to the provisions hereinafter set forth, and the stock so issued shall be full paid stock, and not liable to any further call; and said corporation may also issue stock for the amount it actually pays for labor performed. Provided, that when property is purchased the purchasing corporation must receive in property or stock what the same is reasonably worth in money at a fair bona fide valuation; and provided further, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; and provided further, that when stock is issued on the basis of the stock of any other corporation it may purchase, no stock shall be issued thereon for an amount greater than the sum it actually pays for such stock in cash or its equivalent; and provided further, that the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business; and in all cases when stock is to be issued for property purchased, or for the stock of other corporations purchased, a statement in writing, signed by the directors of the purchasing company or by a majority of them, shall be filed in the office of the Secretary of State, showing what property has been purchased, and what stock of any other corporation has been purchased, and the amount actually paid therefor."

Where a statute forbids the issuance of shares other than for money or money's worth, a subscriber to preferred and common

§ 119. **National banks.** The federal statutes governing the extra liability of shareholders in national banking associations, have an importance beyond that of the subject matter. In contrast with the scheme embodied in the older state legislation, the liability is collected by the liquidator of the corporation for the equal benefit of all creditors; and there is no opportunity for what some of the earlier judges called, with approval, a "race of diligence" among creditors.[1] The decisions of the Supreme Court on the statutes have, as a whole, displayed practical good sense; and they have worked out a method which is simple, economical and efficient. The result is that in many states the older methods have been superseded by legislation substantially like that governing national banks. The important provisions, being sections 5151 and 5152 of the Revised Statutes, are as follows:

5151. The shareholders of every national banking association shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of such association to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

5152. Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested

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stock, who was to pay for the former at par and receive the latter as a bonus, can not be held to his subscription. *Trent Import Co. v. Wheelwright,* 118 Md. 249,—construing a statute of New York.

[1] *Norris v. Johnson,* 34 Md. 491. The inside creditors with knowledge of impending insolvency, of course, had the start; and the race was usually over before the others knew anything about it.

in such trust fund would be if living and competent to act and hold stock in his name.

These sections, and the relevant decisions, establish the following propositions:

First. When a national bank becomes insolvent, the Comptroller of the Currency closes its doors and puts in charge a receiver who is his nominee and is not the officer of any court.[1] When it becomes apparent that the assets will be insufficient to pay creditors in full, the Comptroller determines the assessment to be levied and the receiver proceeds to collect it. He may proceed against the shareholders severally at law or jointly in equity;[2] and being an officer of the United States he may sue and be sued in the federal courts without regard to citizenship.[3]

Second. The person liable is the shareholder of record at the time of insolvency. The fact that the shares have been sold and the certificates delivered in good faith, is no defense if the transfer has not been perfected on the books of the corporation. *Richmond v. Irons,* 121 U. S. 27; *Finn v. Brown,* 142 U. S. 56. But if the failure to make the transfer is the fault of the corporation, the rule is other-

[1]Where a bank has gone into voluntary liquidation, suit may be brought by one creditor in the name of all, and therein the statutory liability may be enforced. *Richmond v. Irons,* 121 U. S. 27.

[2]*Kennedy v. Gibson,* 8 Wall. 498, where it is said: "When the whole amount is sought to be recovered, the proceeding must be at law, where less is required, the proceeding may be in equity." And see *Bank of Bethel v. Pahquioque Bank,* 14 Wall. 383.

[3]*Auten v. Bank,* 174 U. S. 125; *Smith v. Brown,* 88 Fed. 565; *Myers v. Hettinger,* 94 Fed. 370. He also may sue and, subject to the right of removal, be sued in the state courts. For the jurisdiction of the state courts, see *Ex parte Chetwood,* 165 U. S. 443.

wise.[1] And while a transfer on the books, or its equivalent, is indispensable, it will not be effective if colorable or made with fraudulent intent to escape the liability. And so the real owner of shares registered in the name of another may be held for the statutory liability.[2] In *McDonald v. Dewey*, 202 U. S. 510, the appellee, being the registered owner of 105 shares, with knowledge of the bank's insolvency transferred them into the name of an employee. Subsequently, 80 of the shares were sold at various times and transferred on the corporate books from the employee to the purchasers. Finally, the bank suspended,—with 25 shares remaining in the employee's name. It appeared that the purchasers from the employee were of doubtful solvency and that the intent of the appellee in the transaction was to evade the statutory liability. He was held liable for the full assessment as to the 25 shares registered in the name of the employee at the time of the failure; and as to the shares previously sold, he was also held liable, but only to the extent of the unsatis-

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[1] *Whitney v. Butler*, 118 U. S. 655. In *Earle v. Carson*, 107 Fed. 639—affirmed by the Supreme Court, 188 U. S. 42—it appeared that on December 2, the appellee "had sold her shares in good faith without knowledge or suspicion that the bank was either then insolvent, or was likely to prove insolvent, and that she had done everything that was reasonably possible to procure a transfer of the shares on the books of the bank to the purchaser." It appeared that the bank failed on December 23 and was in fact insolvent on December 2; and that the purchaser of the shares, unknown to the appellee, was also insolvent at the time the sale to him was made. The court held, qualifying a dictum in *Stuart v. Hayden*, 169 U. S. 2, that the appellee was released.

And see to the same effect, on a different state of facts, *Apsey v. Kimball*, 221 U. S. 514.

[2] *Bowden v. Johnson*, 107 U. S. 251; *Stuart v. Hayden*, 169 U. S. 1; *Kerr v. Urie*, 86 Md. 72.

fied debts existing when the transfers to the irresponsible vendees were made.[1]

Third. By the terms of section 5152, persons holding as executors, administrators, guardians or trustees, are not personally liable; but this result will not follow if the stock register shows absolute ownership.[2] One registered as absolute owner cannot show that he holds the shares as collateral security only,[3]—although a lender, if he wishes to avoid risk, may place the shares in the name of an irre-

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[1]The court said: "It is only existing creditors who can claim to have been damnified by a fraudulent transfer of shares. Subsequent creditors are apprised by the published list of the names of shareholders to whom transfers have been made, and of the persons to whom they may have recourse for the double liability."

A colorable transfer differs from a fraudulent one in this: that in the former there has been no real change of ownership,—the transferee being merely the alias of the transferor. A fraudulent transfer assumes complete change of ownership; and in it there are two elements to be considered: (1) Knowledge by the transferor of the bank's insolvency; and (2) his knowledge of the insolvency of the transferee. The mere intent to escape the double liability is not fraudulent *per se,* even if accompanied and caused by misgivings of the bank's solvency; and if the transferee is solvent the creditors have no ground for complaint. On the other hand, if the transfer is made without any suspicion of the bank's true condition, the fact that the transferree is insolvent, will not, of itself, make the transferor liable.

[2]In *Kerr v. Urie, supra,* it is said: "The settlement of the affairs of an insolvent bank would be rendered a matter of great expense and delay if persons who appeared on the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock in a representative capacity." In this case one holding stock in a national bank for an undisclosed principal was held liable as a stockholder.

[3]*Bank v. Case,* 99 U. S. 628; with which compare *Magruder v. Colston,* 44 Md. 349.

sponsible employee;[1] or have them registered in his own name as "pledgee."[2] Married women are liable notwithstanding coverture,[3] and infant distributees of a deceased shareholder are also liable to the extent of assets received.[4]

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[1]*Anderson v. Warehouse Co.*, 111 U. S. 479.

[2]*Pauly v. State Loan and Trust Co.*, 165 U. S. 606. In this case it is laid down: (1) That the real owner of the shares may in every case be treated as shareholder within the meaning of sec. 5151. (2) That if the owner transfers his shares as collateral security and by the direction or with the knowledge of the pledgee, they are placed in the name of the latter as the owner, then the pledgee may be treated as shareholder within the meaning of the section. (3) That if the real owner transfers them to another or causes them to be put in the name of another with the intent simply to evade the responsibility imposed by the section, such owner may be treated as a shareholder for the purposes of the section. (4) That if one receives shares as collateral with power of attorney authorizing him to transfer the same on the books and being unwilling to incur the responsibilities of a shareholder, causes the shares to be transferred to another under an agreement that they are to be held as security for the debt due from the real owner to his creditor, he, the creditor, will not, although the former may, be treated as shareholder within the meaning of the section. (5) That registraton as "pledgee" is sufficient to avoid the liability imposed. In *Robinson v. Bank*, 180 U. S. 295, it was held that buying the pledge in, without registration, did not, under the circumstances of that case, make the pledgee liable.

See the summary in *Rankin v. Fidelity Co.*, 189 U. S. 242. In *Ohio Valley National Bank v. Hulett*, 204 U. S. 162 (reported with notes 51 Law. Ed. 423), the pledgee, after the death of the pledgor, caused the stock to be registered in the name of an employee, and afterwards endorsed the value of the stock as a credit on the pledgor's note and presented the same for payment to the pledgor's administrator. It was held that the pledgee was liable as owner.

[3]*Christopher v. Norvell*, 201 U. S. 216; *Keyser v. Hitz*, 133 U. S. 151; *Kerr v. Urie*, 86 Md. 72.

[4]*Matteson v. Dent*, 176 U. S. 521.

Fourth. The judgment of the Comptroller of the Currency as to the necessity for an assessment and the amount thereof, is binding until he is restrained by a direct proceeding in court—*United States v. Knox,* 102 U. S. 422; he may levy as many assessments as are needed, so long as he does not exceed the par value of the share—*Studebaker v. Perry,* 184 U. S. 258; but he has no power to increase the burden of the solvent shareholders or to levy further assessments because other holders are or turn out to be insolvent.[1]

Fifth. Because the amount collectible is due to the common fund, a shareholder-creditor is not permitted to set off any indebtedness due by the corporation to him.[2] The statute of limitations runs from the date of the call by the

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[1]This is on the ground that the statute makes the shareholders responsible "equally and ratably and not one for another." "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by *all the shareholders;* (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation to this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one of the stockholders or his being beyond the jurisdiction of the court does not in any wise affect the liability of another; and if the bank itself in such case holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person and the extent of the several liability of the other stockholders is computed accordingly." *United States v. Knox,* 102 U. S. 422.

[2]*Wingate v. Orchard,* 75 Fed. 241. And see the reasoning of the Court of Appeals in *Cahill v. Original Big Gun Asso.,* 94 Md. 353. For a collection of authorities on this point, see Cook Corporations, 6th Ed., sec. 225 (c).

Comptroller; and is not put in motion by his delay—*Rankin v. Barton,* 199 U. S. 228. The governing statute of limitations is that of the state in which the suit is brought.—*McClaine v. Rankin,* 197 U. S. 154.

§ 120. **Maryland statutory liability.** A treatment of this subject which will be at once concise and accurate, is difficult. The existing laws are implicated with those which have preceded them; and the legislation as a whole has been incongruous. In a broad analysis, this legislation has proceeded along two distinct lines, representing different aims: (a) to secure payment of the *original* liability of the share, that is to say, its par value in money or money's worth; and (b) in the case of a few special classes of corporations, to impose an *extra* liability, that is, additional to the full payment. Anticipating the discussion in the following sections, it may be said:

First. Prior to 1904, every form of statutory liability, original and extra, ran to the creditors directly and individually, and did not constitute assets of the corporation to be collected by the receiver or other liquidator for the equal benefit of all creditors.

Second. By amendatory legislation, beginning with 1904 and ending with 1910, all statutory liability is enforceable by the receiver or liquidator only; and, furthermore, in the case of the extra liability (now limited to state banks, safe deposit, trust and loan companies), the amending statutes have followed substantially the national banking act.

§ 121. **Statutes relating to the original liability of the share.** These can best be understood by considering, first, the law as it stood prior to the legislation of 1908, and then the legislation of that year.

First. **Legislation prior to 1908.** The Act of 1852, which was reproduced in the general incorporation law of 1868, was drastic but simple. Until and unless all of the authorized stock was paid in and a certificate of such payment recorded within thirty days thereafter,—each stockholder was liable to the creditors for an amount up to, but not exceeding, the par value of his shares, whether such shares were fully paid or not. In 1872 came an amendment[1] which was doubtless intended to repeal what had been, in effect, an extra liability. The amendment, however, was grafted upon the original statute by a draftsman to whom consistency was no jewel. The statute as it stood prior to the legislation of 1908 read as follows,—the italicized portion representing the contradictory amendment of 1872:

"All the stockholders * * * shall be severally and individually liable to the creditors of the corporation of which they are stockholders, to an amount equal to the amount of the stock held by them respectively, for all debts and contracts made by the corporation, until the whole amount of the capital stock fixed and limited by the corporation shall have been paid in, and a certificate thereof made and filed, as prescribed in the following section, *which certificate may, however, be filed at any time after thirty days mentioned in said section; but no stockholder shall be individually liable to the creditors of such corporation except in the amount of his, her or their unpaid subscription to the capital stock.*"

In a series of cases, which since the recent legislation are of vanishing importance, it was established: (1) Until the stockholder had paid up the original obligation of the share to the corporation, he was liable, not only to the corporation

[1] See for its history, *Strauss v. Heiss*, 48 Md. 202.

or its receiver for the amount remaining unpaid, but also for a similar amount, extra, to the creditors. Payment to the corporation or to the receiver, however, destroyed the creditor's right, even after the latter had brought suit,—*Booth v. Campbell,* 37 Md. 522. (2) Any creditor of the corporation could pick out one or more of the shareholders who were such at the time the debt was contracted, and by separate suits at law recover the amount of his unpaid debt, —not exceeding, however, as to any defendant, the balance remaining due on his particular shares—*Norris v. Johnson,* 34 Md. 485. The creditor could also have relief in equity; and a stockholder who had paid more than his share was entitled to contribution from the other stockholders.[1] (3) Since the person bound was the shareholder at the time the debt was contracted, the liability was in no way affected by a transfer of the stock—*Hager v. Cleveland,* 36 Md. 476; it attached equally to original and increased shares—*Booth v. Campbell,* 37 Md. 522; but could be waived by the creditor at the time the debt was contracted—*Basshor v. Forbes,* 36 Md. 154. (4) Since the amount recoverable did not constitute a fund for the common benefit of all creditors, the defendant was allowed to set off any debt due him by the corporation, or any sum he had previously been compelled to pay another creditor.[2]

[1]*Crawford v. Rohrer,* 59 Md. 599; *Garling v. Baechtel,* 41 Md. 327; *Weber v. Fickey,* 47 Md. 196; *Fiery v. Emmert,* 36 Md. 471.

[2]*Garling v. Baechtel,* 41 Md. 325; and see *Cahill v. Original &c. Ass'n,* 94 Md. 353. For the question of limitations and various matters of procedure under the former law, see *Weber v. Fickey,* 47 Md. 201; *Garling v. Baechtel,* 41 Md. 305; *Booth v. Campbell,* 37 Md. 522; *Norris v. Wrenschall,* 34 Md. 492, affirmed in *Coulbourn v. Boulton,* 100 Md. 354.

A full review of the earlier decisions will be found in *Pittsburg*

Second. **The legislation of 1908.** Chapter 240 of the Acts of that year embodies a more or less general revision of the whole corporation law of the state. It does not re-enact the provisions of 1868 and 1872, above quoted, but by a section (changed from the original draft and badly worded) it is provided:

"Every stockholder of any corporation of this state, in case of a reduction of its capital stock, * * * shall be liable to the corporation or its receiver for the payment of its liabilities existing at the time of such reduction, to the extent of the amount withdrawn and paid to such stockholder, and (except stockholders in banking corporations and those classes of corporations for which special provision is hereinafter made in this article) every stockholder of any corporation in this state shall remain liable for the benefit of its creditors for the amount of the face value of his stock, or of his subscription in case the stock has not been issued, less the amount he shall already have paid thereon, until he shall have paid said amount in good faith; and in the event of the insolvency of the corporation, such liability shall be considered as an asset of the corporation and may be enforced by the receiver, trustee or other person winding up the affairs of said corporation, notwithstanding any release, agreement or arrangement short of actual payment which may have been made between said corporations and said stockholder."[1]

Steel Co. v. Baltimore Equitable Society, 113 Md. 77, affirmed on writ of error in 226 U. S. 455; and *Republic Iron and Steel Co. v. Carlton,* 189 Fed. 126,—presently noted.

[1]Code 1911, Art. 23, sec. 66. The exception of "stockholders in banking corporations and those classes of corporations for which special provision is hereinafter made," is nonsense. The section deals with the original liability; and it could not have been intended

At the same session of the legislature was passed Chapter 305, which appears as sections 64 and 65 of Article 23 in the Code of 1911. This is an additional graft upon the statutes of 1852 and 1872, which have been discussed. Notwithstanding a vast amount of verbiage, it contains no principle that is not embodied in Chapter 240, and is of no discernible value except as follows: The provisions of Chapter 240 did not become effective until June 1, 1908, and did not change the pre-existing rights and remedies of creditors. At the time the legislature of 1908 was in session, there were numerous cases pending in the courts of Baltimore City, brought by creditors severally against stockholders of insolvent corporations individually, to enforce alleged liability for unpaid shares. To meet this situation, the

to exempt stockholders in these corporations from the common law obligation to pay for the stock in money or money's worth. The rest of the section appears to be merely declaratory of the good faith rule, heretofore discussed and approved in *Tompkins v. Sperry*, 96 Md. 580; and it is not probable that there was any intention to change either the rule laid down in *Brant v. Ehlen*, 59 Md. 1, which protects the purchaser without notice, or the principle embodied in the other decisions hereinbefore discussed, which limits the recovery to the debts of subsequent creditors and, in the absence of actual fraud, eliminates these if there has been actual or record notice of the transaction,—when stock has been issued in exchange for property. See *ante*, § 109, and compare *Sturtevant Co. v. Cosmic Co.*, 111 Md. 673,—where the court properly declined to hold a subscriber to his status obligation. For the rest, the importance of the section consists in its establishment of the principles: (1) that whatever liability may exist, is an asset of the corporation enforceable by the receiver or liquidator for the benefit of all creditors, and not by the creditors severally for their exclusive benefit; (2) and that one who takes shares from the corporation for cash at their real value, if that be less than the nominal value, may be called upon, for the benefit of creditors, to pay the difference.

existing procedure was amended by providing: (1) that as to any liability arising on and after April 6, 1908, it should "be an asset of the corporation for the benefit ratably of all the creditors * * * and enforceable only by appropriate proceedings by such corporation or by a receiver * * * acting under the orders of a court of competent jurisdiction." And as to any liability existing prior to April 6, 1908, it was enacted that the exclusive remedy should be by a bill in equity in the nature of a creditor's bill; and pending suits at law were abated, subject to the right of the plaintiffs to the equitable relief provided.[1]

§ 122. **The extra liability in Maryland.** This section will deal with the legislation and decisions prior to 1904. In the succeeding section the subsequent changes will be noted.

Sources. (a) The Constitution (1867) provides in section 39 of Article III as follows: "The General Assembly

[1]Inasmuch as the provisions of Chapter 240 and those of Chapter 305 agree as to the procedure in cases of liability arising on and after April 6, 1908, the latter chapter is now of no practical importance: See *Hughes v. Hall,* 117 Md. 552. Since the liability, if any exists, is collectible only by the receiver or liquidator as an asset of the corporation, there can no longer be two liabilities for the difference between the par of the shares and the amount paid thereon, one to the corporation and the other to the creditors, as was the case prior to the legislation of 1908. Chapter 305 has been the source of interesting litigation,—for which see *Bettendorf Axle Co. v. Field,* 114 Md. 487, affirming *Pittsburg Steel Co. v. Baltimore Equitable Society,* 113 Md. 77. The contention of the creditors in these cases was that the statute impaired a pre-existing right and did not merely effect a change of remedy. This contention was overruled and the decision of the Maryland court was followed in *Republic Iron and Steel Co. v. Carlton,* 189 Fed. 126. The former case was affirmed on writ of error and the latter approved, in 226 U. S. 455.

shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective Share or Shares of Stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the Books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by law."[1] (b) The Act of 1892, Chapter 109, limited to "every safe deposit, trust, guaranty, loan and fidelity company or association incorporated under any law of this or any other State, district or territory, the United States, or any foreign country receiving money on deposit, or assuming any obligations in this State,"[2]—provided that "each stockholder shall be liable to the depositors

[1]This provision is probably self-executing and operative *ex proprio vigore*—*Murphy v. Wheatley*, 100 Md. 362.

In *Willis v. Mabon*, 48 Minn. 140, the state constitution provided that the stockholders should be liable for the debts of the corporation to the amount of the stock held by them. This provision was decided to be self-executing, because the nature and extent of the right conferred and of the liability imposed, were fixed by the constitution itself. The subject is one upon which there is conflict of opinion. See *Marshall v. Sherman*, 148 N. Y. 9; *Bell v. Farwell*, 176 Ill. 489; and compare *Thomas v. Owens*, 4 Md. 189. As to the right of the legislature to change the liability fixed by the constitution, see *Foster v. Row*, 120 Mich. 1. In this case there was a provision in the constitution making the shareholders of every banking corporation issuing bank notes, liable for corporate debts. It was held that such a provision did not limit the power of the legislature to fix the liability of stockholders in banks not of issue.

[2]Invalid to the extent that it attempts to affect the stockholders of foreign corporations—*Murphy v. Wheatley*, 100 Md. 364. It is difficult to tell from the punctuation whether the qualification "receiving money on deposit" applies to the domestic corporations, or only to the foreign ones. See, however, *Murphy v. Wheatley*, 102 Md. at p. 516.

and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation."

The decisions. The earliest litigation involving any of the provisions recited, arose long after the cases construing and settling the Act of 1868 (*ante*, § 121). In *Hammond v. Straus*, 53 Md. 1 (1890), a depositor of the Union Banking Company was suing a shareholder, and the only litigated question was whether there had been a sufficient acceptance of the charter to bring the corporation into existence. In the general discussion, however, the court, following the decisions under the Act of 1868, said: "To entitle the plaintiff to recover in this action it was essential that three things be made to appear: 1. That a corporation, such as that alleged, should have been created; 2. That the defendant was a stockholder therein; and 3. That the plaintiff was a creditor of the corporation, and that he became such while the defendant was stockholder." In *Colton v. Mayer*, 90 Md. 711, it was held that the liability ran to the creditor and could not be enforced by the receiver of the corporation. In *Cahill v. Original &c. Ass'n*, 94 Md. 353, and in *Straus v. Denny*, 95 Md. 694, it was held that the defendant shareholder was entitled to set off any debt the corporation might owe him. And in *Murphy v. Wheatley*, 102 Md. 520 (which involved the Act of 1892), it was held specifically: (1) "that the liability for double the amount of stock at the par value, means twice the par value of the stock held in addition to the payment of the amount of the subscription for stock"; and (2) that "stockholders are not liable for debts due depositors or other creditors who become such prior to the time such stockholders acquired their stock."[1]

[1]This case was decided after 1904, but was governed, on the points cited, by the pre-existing law. Similar conditions growing

§ 123. **The legislation of 1904 and after.** First. The Act of 1892 was modified by two Acts of 1904, namely, Chapters 101 and 337.[1] The former, which is substantially a reproduction of the corresponding provision of the national banking act: (1) reduces the limit of liability from "double the amount of stock at the par value" to "the amount of stock at the par value in addition to the amount invested in such stock;" and (2) makes the liability an asset of the corporation, enforceable only by the receiver or other liquidator. Chapter 101 expressly excepted any liability existing on March 18, 1904. To meet pending cases (a number of which had been brought against the stockholders of trust companies which had closed their doors in the panic of 1903), Chapter 337 provided that such cases should abate, and that the exclusive remedy should be a bill in equity in the nature of a creditor's bill, to which the plaintiffs in the pending cases could become parties.[2]

Second. By the Act of 1908, Chapter 153, the law was further amended by omitting from the extra liability provision, guaranty and fidelity companies. By the Act of 1910, Chapter 219, trust companies were transferred from Article 23 and included, with state banks, in what is now

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out of the failure of the same corporation were considered in *Miners' &c. Bank v. Snyder,* 100 Md. 67. This was the first case in which the Act of 1892, Chapter 109, came before the court. The opinion contains a concise summing up of the previous decisions under the Act of 1868 and the provision of the Constitution.

[1]Code 1911, Art. 23, secs. 116 and 117.

[2]The legislation of 1904 was the model for Chapter 305 of the Acts of 1908, relating to the original liability of the state and discussed *ante,* § 121. Here, too, the contention was made that the change in remedy involved the impairment of a vested right, but the contention was overruled in *Miners' &c. Bank v. Snyder,* 100 Md. 57.

Article 11 of the Code of 1911, title "Banks and Trust Companies." In section 69 of this Article, governing stockholders of every state bank and trust company, the provisions of Chapter 101 of the Acts of 1904, above noted, are reproduced, and these, as has been said, are substantially those of the national banking act.[1]

§ 124. **Summary.** The extra liability in no manner depends upon whether the shares are or are not fully paid. Whatever may remain due upon the original liability (whether shares have been issued at a discount for cash, or for property at a fraudulent over-valuation) will be collected by the receiver or liquidator, and no longer by the creditor as such. The extent of this obligation, the person bound and the various defenses, have been sufficiently discussed. If the corporation happens to belong to one of the few classes upon which extra liability is imposed, then it may be assumed that the federal decisions, which have construed the national banking act, will be followed; and that the person liable will be the stockholder of record at the time of insolvency, subject to the rules heretofore noted in the case of fraudulent or colorable transfers.[2]

§ 125. **Defenses.** In addition to, and repeating for emphasis, some things that have been said in preceding sections, there will be noted in order: (1) The condition which the law implies in every stock subscription. (2) The case of a subscription obtained by fraud. (3) The question of set-

[1]The Act of 1910 does not, of course, attempt to alter the quantum of liability fixed by the Constitution. It does, however, like the Act of 1908, ch. 240, supersede the previous decisions which, as to questions of procedure and the method of fixing, collecting and distributing the liability, followed the decisions under the Act of 1868.

[2]*Ante*, § 119.

off. (4) The question of limitations. (5) The right to contest creditors' claims.

§ 126. **The condition implied in law.** A defendant against whom the liability of stockholder is sought to be enforced, may escape by showing that his subscription never became effective, because all of the authorized stock was not taken. In this connection, it must be noted: first, that the condition does not apply to increased stock; and second, that it may be waived either (a) by an agreement in the subscription contract that business shall begin before all the authorized stock is subscribed, or (b) by actually participating in business so done.[1]

§ 127. **Subscriptions obtained by fraud.** In every case between the corporation and the subscriber—that is to say whenever the rights of creditors are not involved—the law is, and always has been, that subscriptions fraudulently obtained may, like any other fraudulent transaction, be disaffirmed; and that the existence of fraud constitutes a cause of action in equity for cancellation as well as a defense at law. Of course, wherever fraud or misrepresentation is alleged it must be proved; and the person complaining must show that he has acted with diligence and not played fast and loose. In the earlier cases involving stock subscriptions, however, there was a tendency to hold the complainant to strict proof and to draw distinctions, sometimes shadowy, between fraud, misrepresentations and mere

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[1]For cases in which the rule has been applied or denied, see *Morgan v. Landstreet*, 109 Md. 558; *Bank v. Brown*, 95 Md. 379; *Garling v. Baechtel*, 41 Md. 305; *Hager v. Cleveland*, 36 Md. 476. In *Musgrave v. Morrison*, 54 Md. 161, it was held, naturally, that the condition did not apply to shares in a building association.

expressions of opinion.[1] At the present day, this tendency is not observable, and in the case of subscriptions induced by a prospectus, the weight of authority treats the contract as *uberrimae fidei*: "Those who issue a prospectus * * * are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."—*Savage v. Bartlett,* 78 Md. 566.[2]

Suppose, however, that the defense of fraud in obtaining the subscription is set up in a suit brought by or on behalf of creditors? In a view once approved by the Supreme Court, implicitly at least,[3] the reasoning was this: (1) A creditor trusts the corporation on the faith of its capital stock paid in or promised, and is presumed to know what an inspection of the books would show in regard to the shareholders and the amounts due by them. (2) Under a well recognized principle of law, a fraudulent transaction is voidable only and cannot be avoided against a purchaser for value. (3) The creditor of a corporation is a purchaser

[1]See generally 2 Thomp. Corp. sec. 1360 and following. The relationship of principal and agent must, in order that it may be bound, exist between the corporation and the person making false representations—*Scarlett v. Academy of Music,* 46 Md. 148.

[2]Quoting English decisions, as to which, see *Peek v. Gurney,* (L. R. 6 H. L. 377), as annotated in 7 E. R. C. 561.

[3]"It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription, cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud and in repudiating his contract." *Chubb v. Upton,* 95 U. S. 665.

for value and therefore after the rights of creditors have arisen, it is too late for the shareholders to set up the defense of fraud. This view has had some vogue, but now it is either repudiated or greatly qualified. In *Savage v. Bartlett,* 78 Md. 561, and in the succeeding case of *Fear v. Bartlett,* 81 Md. 435, the question was directly presented. The defendant in each case claimed that material statements contained in the prospectus, and upon the faith of which he had subscribed, were fraudulent misrepresentations, and that while the corporation was still a going concern and within a reasonable time after learning of the fraud, he had given notification that he would not be bound by the subscription. The court summarized the law as follows: (1) That the equities of subsequent creditors are no greater than those of defrauded shareholders; (2) That the latter, who, not being guilty of laches, have repudiated within a reasonable time after the discovery of the fraud, and before the insolvency of the company are not liable; (3) That insolvency means "before proceedings in insolvency, voluntary or involuntary, have been instituted;" (4) That repudiation may, but need not, take the form of a suit in equity for cancellation; (5) "Whether the subscriber could repudiate his subscription obtained by the fraud of the company after its insolvency, when he had no opportunity of becoming aware of the fraud before insolvency, is a question in regard to which we are not to be understood as expressing any opinion."[1]

[1]The question was answered in the affirmative by Judge Dillon in *Upton v. Engelhardt,* 3 Dill. (C. C.) Rep. 496, with the qualification, however, that in all cases, the defendant's plea must aver the "use of reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is claimed." To the same effect is *Newton Bank v. Newbegin,* 74 Fed. 135,—a na-

A similar question is left open in *Lantry v. Wallace,* 182 U. S. 536, in which the receiver of an insolvent national bank was suing a stockholder *at law.* The latter pleaded that he had been induced to subscribe by the fraud of the bank officers, made possible by the negligence of the comptroller. The court said that the defense was not a good one at law, but reserved two questions: (1) Whether in such a case, a court of equity could cancel the subscription even after insolvency; (2) Whether the defrauded shareholder could sue the bank for the damages suffered by the deceit, and, with the judgment thus obtained, participate like any other creditor in the distribution of its assets.

§ 128. **Set-off.** Since the statutory liability, when collected, now constitutes a fund in which all creditors including the defendant may share, the latter cannot set off against his obligation anything the corporation may owe him. The

tional bank case. And for a valuable note on the subject generally, see *Fear v. Bartlett* as reported in 33 L. R. A. 721. There is not much reason in the position taken by some of the courts, that a shareholder must be diligent in finding out whether the statements upon which he has relied are true or false. He ought not to be required to suspect fraud until something has occurred to arouse suspicion. In *Urner v. Sollenberger,* 89 Md. 316, the rule is stated to be: "Subscriptions obtained by fraudulent means (are) revocable by the deceived subscribers, if rescinded by them whilst the company was a going concern, and within a reasonable time after the discovery of the fraud."

In the English rule, as established in *Oakes v. Turquand* (L. R. 2 H. L. 325), the deceived stockholder must not only exercise his right to rescind within a reasonable time but before *restitutio in integrum* becomes impossible. Consequently, the declared insolvency of the corporation followed by a winding-up order, puts an end to any right of rescission on the ground of misrepresentation or otherwise. But because of statutory procedure in winding-up cases, the English decisions are not safe guides.

same result follows where the receiver is suing for a balance due under the subscription contract,—but otherwise where the corporation, as a going concern, is suing therefor.

§ 129. **Limitations.** In the case of a subscription where the day of payment is not fixed thereby or by some controlling statute, the bar of limitations begins from the time named in the call, whether it be made by the corporation or by a court of competent jurisdiction in the event of insolvency.[1] In the case of watered stock, where the transaction is good as between the stockholder and the corporation but not as to creditors, the right of action does not accrue unless and until the corporate assets are insufficient to pay the debts and the additional amount necessary ascertained;[2] consequently, there must be a call by some competent court before the statute begins to run.[3] The same will doubtless be held, by analogy with the decisions under the national banking act, in the case of the extra statutory liability.

§ 130. **Contesting creditors' claims.** In all cases the shareholder defendant is bound by the finding of the court administering the corporate assets as to the necessity for and the proper amount of the assessment. He cannot contest these questions or attack the claims of creditors in another court.[4]

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[1]Compare *Williams v. Watters*, 97 Md. 113; *Williams v. Taylor*, 99 Md. 306.

[2]*Hughes v. Hall*, 117 Md. 547.

[3]For the cases generally, see 3 Clark & Marshall Corp., sec. 802, note 590. *Scovil v. Thayer*, 105 U. S. 143. In this case it was held that before the stockholder could be sued at law, the agreement between him and the company must be set aside. The Maryland act of 1908, chapter 240, section 66 (*ante*, § 120) makes such a proceeding unnecessary.

[4]*Glenn v. Williams*, 60 Md. 93; *Hawkins v. Glenn*, 131 U. S. 328.

§ 131. **The case of shareholders in foreign corporations.** From the principle that a corporation has no existence beyond the bounds of the state that made it, follow logically three conclusions: 1st. The incidents of membership, including the contract by which it is created, are to be determined and construed by the law of the creating state.[1] 2nd. One who deals with a corporation thereby submits to whatever may be the rights of the creating state over it. 3rd. Where a court of the domicil is administering the affairs of the corporation, all of its members, although not parties to the proceeding, are bound by the court's orders so far as they determine the assets and liabilities of the corporation and the necessity for and the amount of an assessment.[2] To illustrate: A citizen of the United States who purchases the bonds of a corporation of Canada cannot, in a United States court, enjoin proceedings under a re-adjusting Act of the Dominion Parliament which impairs the obligation of his contract.[3] Again, a citizen of Maryland

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[1]For a qualification, see *Pinney v. Nelson,* 183 U. S. 144. Here the charter of a Colorado corporation specified as its one purpose the transaction of business in California. The California law, enacted prior to incorporation, imposed the same liability upon stockholders of foreign corporations doing business within the state as upon stockholders of domestic corporations. It was held that the stockholders of the Colorado corporation were subject to the California liability, although no such liability was imposed by the law of Colorado.

[2] But the order of the domicil court does not deprive the shareholder of any defense peculiar to himself. "He had the right to plead a release, or payment, or the statute of limitations, or any other fact going to show that he was not liable on his subscription." *Great Western Co. v. Purdy,* 162 U. S. 329. To the same effect is *Stockley v. Benedict,* 92 Md. 325.

[3] *Canada R. R. Co. v. Gebhard,* 109 U. S. 527. In this case the mortgage securing the bonds was executed to a corporation of

who takes out a policy in a mutual insurance company of Pennsylvania, thereby becomes a member of the corporation; and when the company goes into bankruptcy, the assessment levied by the Pennsylvania court fixes him, although not a party to the winding-up proceeding—*Lycoming Insurance Co. v. Langley,* 62 Md. 196.

Again, if an unwise man from the east invests in the shares of a Kansas corporation, he cannot be heard to plead ignorance of the provision in the constitution of that state which imposes an extra liability in favor of creditors, upon the shareholders of all corporations, except railroads, religious and charitable institutions. Nor can he escape trouble by the simple device of keeping away from Kansas; in the prevailing view, such a liability is not penal and can therefore be enforced wherever the defendant may be sued. The following are further illustrations of the rule and its limitations:

First. Questions relating to the formation, interpreta-

New York as trustee, and the bonds, principal and interest were payable there. The court said: "It follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government. * * * It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

tion and discharge of the subscription contract are to be answered by the law of the corporate domicil. Whether and when fraud in obtaining the subscription is a good defense to a suit on behalf of creditors,—*Fear v. Bartlett*, 81 Md. 435; whether the common law liability shifts with a transfer,—*Glenn v. Williams*, 60 Md. 93; what constitutes a limitation upon the statutory liability,[1]—these are all questions which depend upon the laws of the parent state.

Second. An ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions—*Converse v. Hamilton*, 224 U. S. 257; and except in states which apply the doctrine of comity—*Castleman v. Templeman*, 87 Md. 546—the foreign receiver cannot collect even a subscription balance. Much greater is the difficulty where a foreign receiver or creditor is seeking to enforce a statutory liability. Unless the procedure for collecting the extra liability provided by the state of the domicil, is one which will ensure equal treatment for all stockholders, the court of the forum will usually decline to enforce it.[2] Where, however, the statute of the domicil makes the receiver a *quasi*-assignee of the corporate assets and vests him with authority to collect, he may sue in a

[1]The period of limitations is normally that prescribed by the law of the forum; but where the law of the creating state provides a shorter period for collecting a stockholder's liability, the latter will be regarded as a limitation upon the right; and will prevail. See *Davis v. Mills*, 194 U. S. 451; *Ramsden v. Knowles*, 151 Fed. 721; and 19 Am. & Eng. Ency. Law, 2 Ed. p. 150.

[2]*Hale v. Allison*, 188 U. S. 70; and compare *Evans v. Nellis*, 187 U. S. 271 and *Whitman v. Oxford Bank*, 176 U. S. 559.

foreign jurisdiction; and the refusal of the court of the forum to recognize his title, will constitute a denial of the constitutional full faith and credit to the laws and proceedings of the domicil state.[1]

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[1] *Converse v. Hamilton*, 224 U. S. 243; *Bernheimer v. Converse*, 206 U. S. 516,—in which all of the earlier cases are reviewed. Many states have now enacted laws similar to the recent legislation of Maryland; and in the case last cited such legislation is said to embody "substantially the procedure authorized by the national banking act."

CHAPTER XVII.

TRANSFER OF STOCK.

§ 132. **Preface.** When you execute and deliver an assignment, whether on the back of the certificate or independently of it, you are not, technically speaking, transferring the share. Transfer effects a change in the membership, and it implies the concurrence of the corporation manifested by some entry on its books.

We have seen how, formerly, the power to introduce a new member by assigning to him a share, was not a thing of course; and how, at the present time, it is, in the absence of charter or statute restriction, a matter of right. But the old conception, while nearly forgotten, is still necessary to account for some rules of the existing law. It is true that little of the membership element clings to the modern idea of a share, and that the tendency to identify it with the certificate is strong. It is often said that stock was "transferable at common law";[1] and that a mere assignment of a certificate, without registration, passes the legal title to the share,—or such a title "for many purposes." These expressions, properly understood, do no harm, but they darken the approach to the subject. Transferability,—that is, the right to assign the share and *also* to substitute as

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[1] Compare §§ 54 and 56, *ante*.

to that share, one membership for another, is an acquired trait. Mere assignment does not work a novation; and while the latter may usually be had for the asking, it is still important to ask for it.

In common usage, the word transfer includes any form of assignment; and that in which the corporation participates is distinguished by calling it a "transfer on the books." As between these two forms of transfer, there are some differences upon which the cases agree. On the one hand, any mode of conveyance founded upon valuable consideration will, as between the parties, pass the property in the share and with it any right the *grantor* may have to demand a formal transfer. On the other hand, until a transfer is made, or demanded and wrongfully refused; or until the corporation by some act acquiesces in the transfer,—the incidents of membership status, as between member on the one hand and the corporation and its creditors on the other, do not pass or attach. But the conflict of opinion begins when there are rival contestants for the same share, each claiming under the same registered owner. Suppose that the latter, being evilly minded, first endorses the certificate to A; then, representing that the certificate is lost, executes a written assignment to B; and finally, on the same representation, makes to C a formal transfer on the books, before either A or B has notified the company of his rights. In each case the equities of the vendees may be equal, and it becomes essential to know which one has a legal title to the stock. Again, conflict may arise between the execution creditor of a registered owner and the holder of a prior but unrecorded assignment; or between the personal representatives of a deceased registered owner and the holder of an unrecorded assignment, on the certificate or otherwise,—claiming by way of gift. So again, in

exchange for a certificate which, after being endorsed in blank, has been lost or stolen or which has been endorsed by an infant or lunatic registered owner,—the corporation may have issued a new certificate to an innocent purchaser.

The question of title involved in these and similar situations, has created a mass of conflicting decisions, due, broadly speaking, to differences in the point of view from which the question is examined. All the cases agree that in the matter of receiving votes, paying dividends, asserting liens on stock (where permissible), and generally in all internal affairs, the corporation may treat the registered holder as the real owner of the shares. For the rest, the progressive theories may be traced and summarized, according to the weight of authority and reason, as follows:

First. In the original theory, the share is transferable only upon the books of the corporation and by the act of the registered owner or his attorney in fact. The corporation has the right to demand the actual presence of the transferor; and by waiving this, it takes the risk of a transfer which by reason, for example, of infancy, lunacy or forgery, is unauthorized. It is the signing of the transfer book that passes the legal title and constitutes the equivalent of delivery in the case of tangible property. But a demand for a transfer will be sufficient in case of neglect or wrongful refusal on the part of the corporation; and where no formal transfer books are kept by it, the issue of a new certificate or any other act of acquiescence may operate as a transfer. As a consequence of this theory, a gift of shares by delivery of the endorsed certificate merely, is incomplete. And while a share may be assigned by deed, or by unsealed writing independently of the certificate, or by an endorsement on the certificate, this does not, *ex proprio vigore,* transfer the

share. As between two assignees of the same share with equal equities, the one who by formal transfer or its equivalent first obtains the legal title prevails.

Second. A share may exist without any corresponding certificate. In such case, and during the period when share certificates were of minor importance commercially, the original theory is and was workable. But it does not fit in with modern conditions. Shares become all but universally represented by certificates; trading in shares develops, and in a practical aspect it is much the same as trading in certificates. Normally, moreover, a certificate contains a statement of the corporation that the shares thereby evidenced will be transferred on the corporate books "only on the surrender of this certificate." Normally, also, there is on the back of the certificate a blank form of assignment. Consequently, the tendency grows to identify the share with the certificate: and this tendency is reflected in the decisions. The courts will not go to the extent of treating the certificate as negotiable, but they say that delivery of a certificate duly endorsed passes the legal title to the share, as between the parties, and the equitable title with the right to demand a legal one, as between the corporation and the endorsee of the certificate; and sometimes the certificate is called *quasi*-negotiable.[1] Moreover, by application of the doctrine of estoppel, the corporation is held liable in damages to one dealing in good faith and for value, if the person certified on the certificate to be the owner of the shares is not such. And if

[1] *Ante*, § 93. The necessity for and the effect of a transfer are discussed in the following cases—not with entire consistency: *Pennington v. Gittings*, 2 G. & J. 208; *Retort Co. v. Mali*, 65 Md. 97; *Noble v. Turner*, 69 Md. 519; *Taliaferro v. Bank*, 71 Md. 214; *Bloede v. Bloede Co.*, 84 Md. 141; *Real Estate Co. v. Bird*, 90 Md. 229.

the corporation permits a transfer without demanding a surrender of the certificate, the bona fide holder for value (in the absence of laches) may demand registration as owner or recover damages as for a conversion of the shares.

Third. The final stage of development is that reached by states which have adopted the Uniform Stock Transfer Act.[1] This is a modification of the subject embraced in the title, along lines which are, in the main, well directed. The general result is to identify the share with the certificate by which it is evidenced, and to make share property, where evidenced by a certificate, as nearly negotiable as its nature permits,[2] the dominant idea being that the holder of the certificate in good faith and for value, whether registered or not, is *the* owner of the shares, as against any other claimant, by any other form of assignment voluntary or involuntary, and without regard to whether the latter obtains prior registration on the books or not.

Fourth. The following sections deal with some concrete questions presented in illustrative cases, and it will be seen

[1]Code 1911, Art. 23, secs. 38 to 60. This is the Act of 1910, chap. 73, and is reproduced in the Appendix. Note that it applies only to Maryland corporations and only to certificates (not shares) issued after July 1, 1910. The provision (sec. 58) that the Act shall apply to corporations of other states "whose laws are consistent with" this Act, seems to be meaningless. Certificates of national banking associations are not in terms included.

[2]Not entirely—sec. 39 providing that nothing in the Act "shall be construed as enlarging the powers of an infant or other person lacking full legal capacity," might well have been qualified by the principle of the Negotiable Instruments Act (Code 1911, Art. 13, sec. 41), namely, that "the endorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

that the answers do not consistently follow any particular theory. First of all, an explanation will be given of certain terms used in the discussion.

§ 133. **What is meant by a transfer on the books.** Those which have to do with the capital stock are usually three in number: 1. The Transfer Book. In this are entered in the appropriate columns, the names of the transferor and the transferee and the number of shares transferred. Ordinarily there are entered also the numbers of the certificate cancelled and of the new one issued; but the essential fact is the signature of the transferor, or his attorney acting under the power usually, but not necessarily, embodied in the assignment on the back of the certificate.[1] 2. The Stock Ledger. Into this are posted the transfers, and in it is kept the account of each shareholder, wherein he is credited and debited from time to time with the shares acquired and transferred. 3. The Certificate Book. From this are taken the regularly numbered and executed certificates issued to the shareholder as evidence of ownership. Corresponding with each certificate is the similarly numbered stub,—showing the person to whom it was issued, the num-

[1] In the Appendix are given forms of a transfer on the books; of a share certificate and the assignment and power of attorney endorsed thereon. The place for the name of the attorney to transfer is ordinarily left blank and subsequently filled in with the name of the corporation's transfer clerk. No particular formality is required in the power of attorney, and ordinarily it need not be acknowledged; but in Code 1911, Art. 10, secs. 29 and 30, there is an old provision (Act of 1838, chap. 49) for the transfer by power of attorney of stock standing in the name of a partnership. The effect of this provision is that if the firm name is signed and sealed by one partner and the document acknowledged in the way provided, the power will be as valid and effectual as if signed and sealed by all the members of the firm.

ber of shares it calls for and, usually, the number of the old certificate, if any, surrendered and cancelled.[1]

Of course, it is to be understood that the books relating to capital stock may and do vary with the nature and needs of the particular corporation. Necessarily, there must be a record of the shareholders and of the outstanding certificates; and it is generally provided by statute[2] that a list of shareholders shall be kept accessible to creditors. Where, however, the stock is closely held and transfers are infrequent, very little book-keeping will be needed. If no formal transfer book is kept, as sometimes happens, the law will treat as equivalent to a transfer on the books, any act of the corporation whereby the change of ownership is recognized. In *Cecil National Bank v. Watsontown Bank,* 105 U. S. 217, the appellee was entitled to a lien on its shares for any indebtedness due it by the holder. A certain holder, being also a debtor to the bank, sold his shares to the appellant, and it requested a transfer. The appellee had no formal transfer book, but the change of ownership was indicated by entries on the stock ledger and the certificate book. After these entries had been made, the original holder failed and the appellee sought to assert its lien for the debt against the shares of the appellant. The governing statute provided that "the stock of the bank shall be assignable and transferable on the books of the corporation only, and in the

[1]Code 1911, Art. 23, sec. 33. "Each stockholder shall be entitled to a certificate which shall be signed by the president, or vice-president, and by the secretary or assistant secretary, or treasurer or assistant treasurer of the corporation and sealed with its seal—which shall certify the number of shares owned by him in such corporation." See also *Railway Co. v. Sewell,* 35 Md. 253.

[2]As in Code 1911, Art. 23, sec. 73.

presence of the president and cashier." In determining whether the transfer was complete and the lien thereby waived, the court said: "All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable and fully meets the requirements of the law."[1]

§ 134. **The duty of the corporation to its shareholders touching transfers.** Because and just because it may reasonably regulate the transfer of its stock, insist upon a formal signing of the transfer book, and, if in doubt about the validity of the power of attorney, demand the actual presence of the transferor,—the corporation owes to its shareholder the correlative duty of protecting him against unauthorized transfers. And this duty of protection extends to the beneficial owners of stock standing upon the books of the corporation in the name of a fiduciary. If it treats as valid a forged signature; or an assignment executed by an infant or a lunatic; or if, where shares are held in a fiduciary capacity, it fails to make reasonable inquiry into the authority of the transferor,—in each of these cases the corporation will be liable for restitution or damages at the option of the true owner.[2] And the principle is not changed by the Uni-

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[1]For the right of a corporation to a lien on its shares, see, now, Code 1911, Art. 23, secs. 33 and 52.

[2]*Baltimore v. Norman*, 4 Md. 351; *Chew v. Bank*, 14 Md. 300; *State v. Murray*, 24 Md. 310; *Brown v. Insurance Co.*, 42 Md. 384;

form Stock Transfer Act, except that a valid endorsement of the certificate is not affected by subsequent incapacity before or after delivery of the certificate.[1] But the Act does alter the pre-existing law wherever the question involves, not the capacity or the authority (if a fiduciary) of the registered owner, but the genuineness of his consent to the transfer; and now, a holder in good faith and for value (which includes a pre-existing obligation) of a certificate duly endorsed, acquires a good title from a finder or a thief, as well as in cases where the endorsement was procured by fraud, duress or mistake.

§ 135. **The obligation of the corporation to the holder of its certificate.** Every share certificate necessarily contains one or more representations on the part of the corporation. Universally, there is the statement that the person

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Baltimore v. Ketchum, 57 Md. 23; *Metropolitan Bank v. Baltimore*, 63 Md. 6; *Western Union Co. v. Davenport*, 97 U. S. 369. For the case of transfers by a trustee in breach of his trust, see *Albert v. Bank*, 2 Md. 159. This case was qualified in *Stewart v. Insurance Co.*, 53 Md. 564, and *Marbury v. Ehlen*, 72 Md. 208, but restored in *Grafflin v. Robb*, 84 Md. 451. Compare *Hughes v. Drovers' Bank*, 86 Md. 423; *Tyson v. George's Creek Co.*, 115 Md. 573, and *Baltimore Trust Co. v. George's Creek Co.*, 119 Md. 21. The practical result of the cases is this: Wherever the fiduciary nature of the holding appears on the books, the corporation's liability for an unauthorized transfer depends upon what reasonable inquiry would have revealed; and what constitutes reasonable inquiry depends upon the facts of the particular case. The existing rule is the result of the chancery doctrine of constructive notice and has no proper place in commercial law. The corporation should be allowed the presumption that a fiduciary is acting honestly; and where there is nothing to indicate the contrary, the loss should fall upon those who have put their trust in the trustee. Compare *Bank v. Kenney*, 116 Md. 24.

[1]Code 1911, Art. 23, sec. 43.

named is the owner of one or more shares. Usually, the shares are represented to be full-paid and non-assessable; to be transferable on the books of the corporation only; and not to be so transferable unless the certificate is surrendered. The corporation is presumed to know that in the usual course of business the representations contained in a certificate are acted upon; and it will consequently be responsible to any one who, relying upon such representations, has been misled to his hurt.[1] In *Bank v. Lanier*, 11 Wall. 369, the appellant had, in 1865, issued to a certain Culver two certificates for shares of its capital stock. On the twenty-ninth of January, 1866, the appellee purchased the stock and received from Culver the certificates with the usual powers of attorney to transfer endorsed thereon. On the thirty-first day of the same month of January the bank was notified of the purchase, but no request for the transfer of the stock to the appellee was made until January, 1868,—when it was made and refused. The justification for the refusal was that at the time the shares were issued to Culver he had, without surrendering the certificates pledged them—with a separate power of attorney to sell and transfer, as security for such deposits as the bank might thereafter make with a banking firm of which he was a member. The court held that the defense was unavailing because, by the Act of Congress, banking associations are expressly prohibited from making any loan or discount on the security of their own shares. Futhermore it was said: "If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this char-

[1] *Metropolitan Bank v. Baltimore*, 63 Md. 6.

acter are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."[1]

This quotation is a somewhat broad statement of the law; but it furnishes a convenient text for certain limitations upon and certain consequences of the general doctrine expressed in it.

First. Where by its charter or some governing statute, the corporation is entitled to a lien on its shares for debts due it by the holder, this lien is not waived because the certificate omits any reference to the lien. The assignee takes the shares subject to the rights of the corporation, because he is bound to take notice of what its charter or the governing statute contains—*Reese v. Bank,* 14 Md. 271; *Hammond v. Hastings Co.,* 134 U. S. 401. The rights of the corporation, however, are waivable and they will be considered as waived by a transfer on the books or some equivalent act whereby the assignee is recognized

[1]To the same effect is *Bank v. Buffalo Ins. Co.,* 193 U. S. 581.

as shareholder—*Cecil Bank v. Watsontown Bank,* 105 U. S. 217.[1]

Second. The assurance "that the corporation will not transfer the stock to any one not in possession of the certificates,"—must be limited to voluntary transfers. It has no application to a transfer compelled by law,—as for example, to the purchaser of shares sold under an execution against the registered owner. So in *Dewing v. Perdicaries,* 96 U. S. 193, it was held that purchasers and their assignees of shares sequestrated and sold at public auction under a statute of the Confederate States, as property of alien enemies,—could not claim indemnity from the company upon being compelled to restore such shares to the former owners.

Third. The liability of the corporation to make good the representations contained in its certificate exists only in favor of one who, relying thereon, has altered his position. In *Brown v. Insurance Co.,* 42 Md. 384, one Denson was the registered owner and held a certificate for shares of the appellee. Quincy, his partner, got possession of the certificate, forged Denson's name to an assignment and power of attorney to transfer thereon, and pledged the shares to the appellant,—who took them in good faith. Soon thereafter the latter presented the certificate and requested a transfer of the shares,—which was accordingly done, and a new certificate was issued to him. In the following month the forgery was discovered and the question was, where the loss should fall. It was held, that never having parted with his shares, Denson was entitled to be

[1]Both the Act of 1908 and the Uniform Stock Transfer Act, *supra* require liens and restrictions to be stamped on the certificate. The lien referred to is that of the corporation. For the lien of unpaid taxes, see Code 1911, Art. 81, sec. 159.

re-instated as shareholder; and that, as between the appellant and the appellee, the former should bear the loss, because he had not been misled by the issue of the unauthorized certificate nor had his position been changed thereby.[1]

Fourth. A registered owner cannot, by an unauthorized transfer, be deprived of his shares. He may compel the corporation by bill in equity to re-instate him; or, in the alternative, recover at law the value of his stock,—but re-instatement is his right.[2] But the cases are in conflict on the question whether the purchaser of the new but unauthorized certificate is entitled to the rights of a stockholder, or merely to an action for damages. The question is not of practical importance if shares of the corporation can be bought in the market. But in any case, where so doing would not result in an over-issue of the capital stock, there is no reason why the corporation should not be estopped to deny that the certificate holder is entitled to the rights of a stockholder.

Fifth. Another vexed question arises when the registered owner has lost his certificate and applies for the issue of another. On the one hand is the apparent right of the shareholder to demand evidence of his ownership; at the same time all is not lost that is missing, and there is a possibility that the original certificate may be or get into the hands of an innocent purchaser. The subject is usually

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[1]See to the same effect *Hambleton v. Railroad Co.*, 44 Md. 551, and *Metropolitan Bank v. Baltimore*, 63 Md. 6.

[2]*Chew v. Bank*, 14 Md. 299; *Brown v. Insurance Co.*, 42 Md. 384; *Western Union Co. v. Davenport*, 97 U. S. 369. For the measure of damages in an action at law, see *Railway Co. v. Sewell*, 35 Md. 257.

regulated by statute.[1] With practical unanimity, the courts hold, in the absence of statute, that upon clear proof of loss or destruction and the furnishing of a bond of indemnity, equity will compel the issue of a new certificate. And there is good authority for the proposition that in addition to the bond, the corporation may cause the new certificate to be marked "Duplicate."[2]

Sixth. A person presenting a certificate for transfer warrants to the corporation the genuineness of the transaction, including signatures; and he is responsible to it for any loss it may sustain by reason of its liability to the purchaser of the new or unauthorized certificate.[3] The Uniform Stock Transfer Act, secs. 48 and 49, provides as follows:

"A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—(a) That the certificate is genuine; (b) That he has a legal right to transfer it; and (c) That he has no knowledge of any fact which would impair the validity of the certificate. In the case

[1]Code 1911, Art. 23, secs. 12, 50 and 67. And see Act of 1912, ch. 78.

[2]*Keller v. Eureka Co.*, 40 Mo. App. 84; 11 L. R. A. 472. In this case it was ordered that the new certificate should be further marked "Issued in pursuance of the decree of the Circuit Court of the City of St. Louis, State of Missouri, in the case of Henry Keller v. Eureka Brick Machine Manufacturing Company, being case numbered 81,263 on the docket of that court in lieu of other certificates found by the court to have been accidentally lost and not negotiated by said Keller." In this case there is a vigorous dissenting opinion, based on the obvious fact that such a marking renders the share practically unsalable.

[3]*Railroad Co. v. Richardson*, 135 Mass. 473; *Hambleton v. Railroad Co.*, 44 Md. 551; Machen, Corp., sec. 942.

of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim."

"A mortgagee, pledgee or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby."

§ 136. **A gift of shares.** From the original theory, that only by a transfer on the books is delivery effected and title transferred, it follows that a gift of shares, by delivery of the endorsed certificate merely, is incomplete; is revocable by the donor, and is revoked by his death before transfer. Logically, this result should not follow where the courts hold that as between the parties a legal title passes by delivery of the endorsed certificate, and an equitable one as between the corporation and the endorsee;[1] but the old rule continued in Maryland until modified by the Uniform Stock Transfer Act.

[1] See, generally, 2 Thompson, Corp. secs. 2390 and 2436; 2 L. R. A. (N. S.) 804; *Basket v. Hassell,* 107 U. S. 602. In *Leyson v. Davis,* 31 L. R. A. 429, it was held by the Supreme Court of Montana that a gift of shares in a national bank may be made *causa mortis* by a delivery of the certificates without a transfer on the books or an endorsement on the certificates themselves, upon the ground that the equitable title passes thereby to the donee and entitles him to call for the legal title as against the donor's personal representatives. An appeal in this case, taken to the Supreme Court of the United States, (170 U. S. 36) was dismissed on the ground that no federal question was involved; but Justice Harlan dissented, being of opinion that the appeal should be entertained and the judgment affirmed.

In *Pennington v. Gittings,* 2 G. & J. 122, the registered owner endorsed the certificate and delivered the same to his daughter as a gift of the shares. No transfer was made on the books, the father died and his executor, who was the residuary legatee, claimed the stock on the ground that the gift had not been perfected. Upon a bill filed by the daughter to compel a transfer of the shares, the court said: "The alleged gift seems to have been intended as a *donatio inter vivos;* but whether a *donatio inter vivos* or *donatio causa mortis,* makes no difference. Such a gift cannot be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift. This is admitted; indeed it cannot be denied. * * * The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor with the legal power and dominion over it. * * * It appears upon the face of the certificate that the stock was transferable at the bank only, and it is admitted that the endorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate that was the subject of the intended gift, it matters not whether the endorsement was in full or in blank; for, as in the case of a check on the banker, which not being presented and paid in the lifetime of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the check might, by presenting it in the lifetime of the maker, have obtained the money, and thus perfected the gift; so here, even if by the endorsement of the certificate, whether filled up or remaining in blank, Mrs. Patterson might have gone to the bank in the

lifetime of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery."[1]

§ 137. **A pledge of shares.** A pledge of a chattel differs from a mortgage substantially in that the former transfers possession without title, and the latter, title without possession. And since the certificate is not the share, and theoretically there is no way by delivery of separating title and possession,—a share was in the earlier stage of the law, incapable of being made the subject of a pledge. This view no longer prevails; and, without the aid of statute, logic has been subordinated to convenience.

First. A pledgee of stock does not convert it by surrendering the certificate received and having the shares transferred into his own name on the books of the company. Nor does the usual rule apply that a pledgee upon payment must return the identical property received. One certificate is as good as another; one share is not distinguishable from the other shares; and it is enough that the pledgee keeps and is ready to return the same number of shares he received.—

[1]To the same effect is *Retort Co. v. Mali,* 65 Md. 93. Where shares are represented by a certificate, the general effect of the Uniform Stock Transfer Act is to prevent title to the shares from passing independently of the certificate; and to make the title passed by delivery of the endorsed certificate, complete. The consequence seems to be that delivery of the certificate is delivery of the share. Note that the Act applies only to certificates issued by Maryland corporations after July 1, 1910; and that a gift of shares by assignment *aliunde* the certificate is not affected by the Act.

Price v. Gover, 40 Md. 102; *Rich v. Boyce*, 39 Md. 314; *Worthington v. Tormey*, 34 Md. 193.

Second. There can be no pledge of stock without a transfer on the books or a delivery of the certificate so endorsed as to authorize the transfer. In *Christian v. R. R. Co.*, 133 U. S. 233, the general doctrine is summarized: "A pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself or in blank (unless payable to bearer) so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals; and they may be used in the same manner as pledges properly so called. If there is no transfer attached to, or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect."[1]

Third. The pledgee of a chattel has no right to repledge it before default; and this by weight of authority is true in the case of stock,—unless, of course, the pledgor otherwise agrees. Where, however, the pledgee is a broker, carrying the shares on margin for a customer, a usage to re-pledge has been sustained;[2] and where the second pledge is for no

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[1] For attempts to assert the equitable right, see *Buffalo Ins. Co. v. Third National Bank*, 162 N. Y. 163: 48 L. R. A. 107; 193 U. S. 581; and *Atkinson v. Foster*, 134 Ill. 472.

[2] *Skiff v. Stoddard*, 63 Conn. 198; reported with full briefs in 21 L. R. A. 102.

more than the amount due the first pledgee and the rights of the first pledgor are protected,—there is no conversion.[1]

Fourth. If by endorsing on the certificate a blank assignment and power of attorney to transfer, the owner entrusts a pledgee with the *indicia* of ownership,—one who deals with the latter in good faith as absolute owner will be protected. And this is so whether the pledgee sells, or re-pledges for his own debt.[2] But the wording of the endorsement may give notice of some limitation or restriction upon the rights of the holder of the endorsed certificate, and this principle has had a peculiar development in Maryland. Essentially, the blank form of assignment on the back of a certificate consists of two parts: first the assignment proper, and second the power of attorney to sign the transfer on the books. A form which had been in use for many years in many states and is still common, contains a wordy and meaningless amplification of the power of attorney. Instead of saying simply "to transfer the said shares on the books of the corporation with full powers of substitution in the premises," it reads: "I hereby constitute and appoint

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[1]*Oregon Co. v. Hillmers,* 20 Fed. 717; cited in *German Bank v. Renshaw,* 78 Md. 475. In *Price v. Gover,* 40 Md. 106, decided in 1874, the question of a pledgee's right to re-pledge was left open; by the Act of 1878, Code 1904, Art. 27, sec. 167, it is made a misdemeanor, punishable by fine or imprisonment or both "for any person or persons, bank, building association or corporation to re-pledge or re-hypothecate any stocks, bonds or other security or securities the title to which passes by delivery or endorsement, received or held by him or them, as security for any money lent or advanced to the owner or holder of such stocks, bonds or other securities, during the continuance of the contract of pledge or hypothecation, without the consent of the pledgor."

[2]This is the general doctrine and is assumed by Judge Alvey, dissenting on other points, in *Tome v. R. R. Co.,* 39 Md. 105.

.....my true and lawful attorney irrevocable for me and in my name and stead but to his use to sell, assign, transfer and set over all or any part of the said stock." In a hard case, where the holder of the endorsed certificate, in violation of the owner's rights, pledged the certificate and shares for his own debt, the court held that the assignment gave the holder the right to sell but not the right to pledge; and that the pledgee took subject to the rights of the real owner.[1]

§ 138. **Execution on shares.** There is no way, independently of statute, by which a creditor can reach the share property of his debtor. A share is a chose in action, and therefore not subject to direct levy; it does not constitute a debt due by the corporation to the holder, and therefore cannot be reached by garnishment. Statutes, however, universally provide some manner for reaching stock, and in the construction of them a great diversity of opinion has arisen over this question,—Whether an unrecorded but prior assignment by the registered owner, being the execution debtor, is good as against the execution creditor.

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[1]*German Bank v. Renshaw*, 78 Md. 275. In *Merchants' Bank v. Williams*, 110 Md. 334, a certificate having a similarly worded assignment was pledged by the owner (not being the registered holder) to a banker who repledged to the appellant; and the same rule was applied. It is not certain how far the Uniform Stock Transfer Act affects these decisions. A pledgee is "a purchaser for value in good faith;" and section 58 (2) eliminates the doctrine of constructive notice by declaring that "a thing is done in good faith when it is in fact done honestly, whether it be done negligently or not." All the same, notice given by a restrictive endorsement is more than constructive. And while a purchaser is safe, it behooves the Maryland pledgee of an unregistered holder to avoid certificates having this peculiar form of assignment. He can escape trouble by requiring the borrower to register.

In the leading case of *Fisher v. Essex Bank*, 5 Gray 373, decided in 1855, it is said by Shaw, C. J.: "It is obviously an object of great importance that this large amount of (share) property should be attachable and liable to be sold on execution. * * * The certificate being in the hands of the debtor, or some other person on his account, and his interest being adverse to that of the attaching creditor, the officer could seldom, if ever, take possession of it as a chattel. It is therefore provided that the attachment may be effected by leaving written notice at the bank; and, on a sale on execution, it is made the duty of the bank and its officers, on notice and request, to give the purchaser a new certificate This of necessity supersedes the outstanding certificate to the former holder. All these objects are most effectually accomplished by making the transfer at the bank, the decisive act of passing the property, the legal, transferable, attachable interest." This is, of course, a corollary of the original theory, above discussed, and it conflicts with the modern tendency to protect the unregistered certificate holder. In a number of states statutes have been passed whereunder a purchaser or pledgee for value, who has received the certificate with an assignment and power of attorney to transfer, takes the legal title to the shares against all persons, including the execution creditors of the registered holder;[1] and such is the effect of the Uniform Stock Transfer Act.[2]

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[1] Under such statutes, it makes no difference to the holder of the endorsed certificate without notice, that an execution is outstanding at the time of the pledge or purchase. For a collection of the authorities, enacted and judicial, in the different states, see 2 Cook Corp. secs. 486 and following. Machen Corp. sec. 885.

[2] *Post*, § 140.

§ 139. **The Maryland law.** Prior to the Act of 1908, ch. 240, it was provided as follows: "Any interest which any defendant in a judgment or decree rendered by a court of law or equity, or *in a proceeding by attachment on original process,* has in the capital, joint stock or debts of a corporation transferable on its books, shall be liable to execution or attachment and the same proceedings shall be had as in other cases, except when they are varied by the following sections: *provided that all executions or attachments levied or laid upon the shares or interest of any defendant in the capital, joint stock or debts of a corporation standing on its books in his name, shall only affect the interest which such defendant had in such capital, joint stock or debts at the time of levying such execution or attachment, and shall not in any way affect the right, title or interest acquired by any bona fide purchaser or pledgee for value to or in the capital, joint stock or debts of such corporation standing on its books in the name of such defendant, by a sale or pledge thereof by such defendant by a delivery of the certificate representing such capital, joint stock or debts, with a power of attorney to transfer the same made prior to the levying of such execution or attachment, and that nothing contained in the succeeding sections of this article shall be construed to apply to any such capital, joint stock or debts so sold or pledged, or to prohibit or prevent any such corporation or purchaser or pledgee from transfering the said capital, joint stock or debts represented by such certificate upon the books of such corporation in the same manner and to the same effect as if no such execution or attachment had been levied.*"

The italicised portion of the quotation represents the amendment of 1886, Ch. 287, to the original provisions of

the Act of 1868. The cause of the amendment was the interpretation put upon the original Act by the case of *Noble v. Turner*, 69 Md. 519,—in which for the first time in this State, the question of conflicting rights between an execution creditor and an unregistered certificate holder was presented. The case was complicated with the question of laches on the part of the unregistered assignee. The facts were these: The registered owner of shares in a Maryland corporation had endorsed the certificate and pledged the stock to a bank of Pennsylvania as collateral for the payment of his note, which had been endorsed by the appellant. The note was not paid at maturity, the endorsee made partial payments from time to time, and having finally paid it off, received the note with the certificate; but no transfer was ever made upon the corporate books or notice given to the corporation of the transfer. Three years after the original pledge, the appellee, who was a creditor of the registered owner, sued out a non-resident attachment under which the shares were levied upon, seized and sold under the provisions of the Code. They were bought in by the appellee, transferred to him on the books by the sheriff and the corporation issued to him a new certificate. Four years later, the appellant filed his bill for the cancellation of the appellee's certificate and for the issue of a new one to himself. The court held that there was negligence in the failure to apply for a transfer on the books; and that "while *inter partes* (i. e., the assignor and assignee) the provision for transfer on corporation books is treated as unessential to equitable title, yet as against the corporations or third parties, it is essential and the assignment is imperfect and exe-

cutory unless perfected on the books of the corporation."[1]

The effect of the amendment of 1886. If the shares had been sold or pledged to a *bona fide* holder for value, prior to the execution proceeding; and if the certificate with a power of attorney to transfer had been endorsed and delivered,—the rights of the unrecorded purchaser or pledgee were protected. Notwithstanding the amendment, however, the endorsee of the certificate had at his peril to know whether the corporation had been previously notified of an execution.

§ 140. **The execution provisions of the Act of 1908 and the Uniform Stock Transfer Act.** In the absence of statute, the doctrine of constructive notice by *lis pendens* does not apply to share property.[2] To relieve the intending purchaser or pledgee of a share certificate from the necessity of inquiring whether the corporation had previously received notice of an execution against the registered owner: to relieve the corporation from the danger of having two unqualified certificates outstanding for the same share, and to simplify the procedure in cases of execution,—the Act of 1908 (Code 1911, Art. 23, secs. 68 to 71) changed the preexisting law as follows:

68. The interest which any defendant in a judgment or decree rendered by a Court of Law or Equity, or in any proceeding by attachment, has on the books thereof in the capital stock of a corporation of this State, or of any National Bank located therein, shall be liable to execution or attachment, and the proceedings thereon shall be as follows: the sheriff or other execution officer charged with the execution

[1] It appears to have been overlooked in this case that the statute did not contemplate a non-resident attachment.

[2] Machen, Corp. sec. 814.

of the writ shall leave at the principal office of the corporation a notice in writing that he has seized the stock of the defendant (naming him and the purpose for which he has seized the same), and shall retain a copy of such notice and return it with the writ, the precise time of service being endorsed thereon. Upon receipt of such notice, the president or officer of the corporation to whom the same shall have been delivered, shall state in writing to the sheriff or other execution officer, the number of shares of stock standing in the name of the defendant at the time of such notice; and if the president or other corporate officer shall refuse or neglect for twenty-four hours to deliver such statement, the sheriff or other execution officer shall certify the fact to the Court to which the writ is returnable, or to any judge thereof; and the said judge or court may order an attachment for contempt against such president or other corporate officer, and may compel him to answer under oath on oral examination, as to the number of shares of stock in the name of such defendant at the time of service of such notice, and may compel the production of the books of the corporation, and also fine the president or other officer for not giving the required statement. When the sheriff or other execution officer has ascertained the number of shares of stock standing in the name of the defendant he shall make a schedule thereof, or of so much thereof as will be amply sufficient to secure the debt and costs, and shall give notice to the corporation that the shares not included in this schedule are released. Thereupon such proceedings shall be had under the writ of execution or attachment as if the shares so seized were real estate; and they shall be transferred to the purchaser on the books of the corporation by such sheriff or other execution officer, or by such person as shall be

named by the court to which said writ is returnable. It shall be the duty of the corporation to issue to the purchaser at the sale made by the sheriff or other execution officer a certificate for such shares, but such certificate and all renewals and substitutions therefor shall have stamped thereon the statement that they are issued under and subject to the provisions of this article, and if such be the fact, that the original certificate is outstanding.

69. If any corporation shall refuse to permit any transfer or to issue a new certificate as authorized to be made and issued by the preceding section, the Court to which the writ is returnable or any judge thereof in vacation may punish by process of contempt all persons so refusing to permit such transfer or to issue such certificate and the corporation shall be liable for all damages sustained by the purchaser by reason of the refusal to make such transfer and issue such certificate.

70. If the writ of execution or attachment shall be issued by a justice of the peace, the power and authority vested by the two preceding sections in a court or any judge thereof, shall be vested in and exercised by the Court or judge having jurisdiction on appeal from such justice of the peace.

71. No execution or attachment issued or levied upon the shares of any defendant in the capital stock of a corporation standing on its books in his name, shall affect any other interest than such as such defendant actually had in such shares at the time of the delivery to the corporation by the sheriff or other execution officer of the notice required by Section 68 of this Article. Nor shall any such execution or attachment in any way affect the right, title or interest of any *bona fide* purchaser or pledgee for value without actual

notice of such execution or attachment, who shall have received the certificate of stock with a written transfer thereof endorsed thereon (or with a written power of attorney to sell, assign or transfer the same), signed by the person named as stockholder in such certificate. And such purchaser or pledgee shall have power to name any person as attorney to transfer the shares to him on the books of the corporation; and upon and after the production and delivery of the original certificate to the corporation, he shall be entitled to a new certificate for said shares and the rights of a lawful holder thereof.

The Uniform Stock Transfer Act (1910), which in terms repeals "all Acts or parts of Acts inconsistent with this Act," contains two relevant provisions:

50. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

51. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

The effect of these provisions on the Act of 1908 is doubtful and they are no improvement. They apply, of course, only where the shares are represented by an out-

standing certificate; and to certificates of Maryland corporations issued after July 1, 1910. Apparently, the creditor can in no case start execution proceedings unless the certificate belonging to his debtor can be "actually seized" by the execution officer. Section 50, it is true, contemplates two other situations, namely (1) where the certificate has been surrendered to the corporation; and (2) where its transfer by the holder has been enjoined. The first situation is improbable and the *modus operandi* is left to the imagination; the section postulates a preliminary injunction proceeding, and this will hardly give the plaintiff a prior lien. Section 51 seems to be a frank confession of despair.[1]

§ 141. **Situs of share property for the purpose of execution.** Almost uniformly this is held to be the state of the corporation's domicil.[2] Where, however, a statute identifies the share with the certificate, and the certificate can be seized and sold, such a proceeding may pass the interest of the owner therein.[3] Shares in a national bank located within the state may be reached in the way provided by the statute of that state for its own corporations.[4]

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[1]Compare the situation in *Morton v. Grafflin*, 68 Md. 545.

[2] 2 Cook, Corp. sec. 485; and see *Morton v. Grafflin*, 68 Md. 545.

[3]In *Simpson v. Jersey City Co.*, 165 N. Y. 193 (reported with a valuable note in 55 L. R. A. 796), the court, treating the corporation as a debtor to the shareholder, reached the result without the aid of a statute; *contra, Winslow v. Fletcher*, 53 Conn. 390; *Pinney v. Nevills*, 86 Fed. 97. An execution statute can only effectively regulate shares of domestic corporations.

[4]This is doubted, *obiter*, in *Sowles v. National Union Bank*, 82 Fed. 696, on the ground that such property owes its existence to the laws of the United States. It is difficult to see how this creates any exemption from seizure for the debts of its owner. The right is expressly upheld in *Re Braden's Estate*, 165 Pa. St. 184; and *Oldacre v. Butler*, 116 Ala. 652.

§ 142. **The vendee's duty to transfer.** Registration is the move of the vendee; but a prudent vendor will see that it is made wherever the shares may be subject to a liability. If by reason of being still on the books, the vendor is called upon to pay, he may demand reimbursement from the person who was the real owner at the time the liability became fixed. This person may or may not be his immediate vendee.[1]

§ 143. **The rights of the corporation.** On any question involving the *inter sese* rights and liabilities of stockholder and corporation, the latter may safely deal with the apparent as the real owner and it is not bound to require production of the certificate. It may pay him the dividends; it may recognize him only, or his proxy, as the person entitled to vote; and it may for a reasonable period close its books against transfers.[2]

§ 144. **Summary. The risk assumed, under the Maryland law, by an unregistered holder and by the person dealing with him.** In *Bloede v. Bloede Co.*, 84 Md. 141, it is stated broadly that: "The entry of the transfer on the books of the company is required, not for the translation of the title, but for the protection of the parties and others dealing with the company; and to enable the company to know who are its stockholders entitled to vote at meetings and to receive dividends when declared." Specifically, we have seen: (1) Except in the case of the delivery of endorsed

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[1] See the cases collected in 1 Cook, Corp. sec. 262; *Brinkley v. Hambleton*, 67 Md. 169; *Hutzler v. Lord*, 64 Md. 534.

[2] This is commonly done prior to the day fixed for an election or for the payment of a dividend. In *Tome v. Railroad Co.*, 39 Md. 39, it appears that the defendant corporation closed its books pending investigation into a fraudulent over-issue of stock.

certificates governed by the Uniform Stock Transfer Act, registration or some equivalent act is still essential to the validity of a gift of shares. (2) In the case of shares subject to liability, there is no novation without formal transfer. (3) The liability for calls and that imposed by statute in favor of creditors attaches to the registered owner. (4) Where by charter or statute the corporation is given a lien upon its shares or some restriction on alienation is imposed, a transfer on the books or some equivalent act on the part of the corporation is necessary to constitute a waiver of the lien or restriction.

One dealing with the holder (not being the person to whom it was issued) of an endorsed certificate takes, in addition to the risks (1) and (3) above given, the further risk: 1. That the endorsement of the registered holder on the certificate may be a forgery or otherwise not binding upon him; 2. That the assignment and power of transfer endorsed on the certificate may, as in *Bank v. Renshaw*, 78 Md. 475 and *Merchants' Bank v. Williams*, 110 Md. 334, be held to give notice of a restriction upon the rights of the holder.

CHAPTER XVIII.

DIVIDENDS.

§ 145. **The nature of a dividend.** It has been previously shown that a dividend is the distribution among stockholders of the surplus, as distinguished from the capital, assets. It may be payable out of current profits or out of the accumulated surplus; it has no existence until it is "declared" by a formal resolution of the directors; they are, in the absence of fraud, the exclusive judges of whether and how much of a dividend shall be declared; and their action is limited only by the rules which forbid the impairment of the capital stock and any discrimination among stockholders of the same class.[1] After declaration, a dividend becomes a debt due from the corporation to its stockholders, payable at the time named in the resolution declaring it; but interest will not be chargeable against the corporation nor will limitations run in its favor until a demand is made;[2] and being a debt it may be applied in whole or in part to any indebtedness due from the stockholder to it.[3]

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[1] *State v. Railroad Co.*, 6 Gill 363.

[2] *State v. Railroad Co.*, 6 Gill 363. Of course, in the case of preferred stock, a dividend may, by contract, be compulsory if earned. For the liability of directors who participate in the declaration of unearned dividends, see *ante*, § 66; and for the special provisions governing state banks and trust companies, see Code (1911), Art. 11, secs. 65-68. For what constitutes the fund available for dividends, see the learned discussion in Machen, Corporations, sec. 1313, *et seq.*

[3] *Gemmell v. Davis*, 75 Md. 546. This was the case of a dividend in liquidation. As against an unregistered holder the corporation

§ 146. **To whom dividends belong.** As between successive owners of a share, the dividend belongs to him who is the owner at the time it is declared; and this is true although there is a future day for payment. Such is the rule also where there are successive interests in the same share, as in the case of a life tenant and remainderman;—there will be no apportionment where the life tenancy expires between dividend days.[1]

§ 147. **The right to extraordinary dividends as between a holder for life and the remainderman.** Present and remainder interests in the same share must arise by some act on the part of the owner which, for convenience and brevity, may be called the creation of a trust. Where such interests exist, a question of difficulty arises when the dividend represents something more than a mere division of current profits, and the will or deed creating the trust has not provided for the case. Sometimes an extraordinary distribution is made, in whole or in part, of the accumulated earnings which have been previously carried to the surplus account or held as undivided profits; and such a dividend may be made payable in cash, or in shares of the corporation's unissued stock. In determining the respective rights of life tenant and remainderman, this proposition would seem obvious for fairness: that so much of the dividend,

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has no right to set off the dividend against a debt due it by the apparent owner, unless the debt was contracted on the faith of the dividend and, presumably, after the declaration and before notice to the company of the assignment of the shares.

[1] See the cases collected in 9 Am. and Eng. Ency. Law, 2d ed., 721, note 1; and 719, note 1. The question, whether apart from charter or by-law, the directors have power to declare a dividend and make it payable only to those who are stockholders at a future date,—is discussed and answered negatively in xiii Columbia Law Review, p. 400.

whether in stock or cash, as represents accumulations existing at the time the trust was created, should become part of the corpus of the trust estate and go over to the remainderman upon the death of the life tenant. This is the so-called Pennsylvania rule; but its limitations in the way of practical application are obvious. In other cases, the test is whether the dividend is paid in stock or in money; the former being treated as an accretion of the corpus and the latter as income; and no account is taken of the periods during which the accumulations were earned. This is the so-called Massachusetts rule, which finds its best statement in *Gibbons v. Mahon,* 136 U. S. 549; and which proceeds upon the theory that a dividend payable only in stock is a capitalization and not a division of the accumulated profits. The Maryland decisions are these: (1) A stock dividend representing earnings previously devoted to betterments, will be apportioned where earnings accruing during the life estate are included therein. *Thomas v. Gregg,* 78 Md. 545. (2) A cash dividend goes to the life tenant without regard to the time of accumulation. *Quinn v. Safe Deposit and Trust Co.,* 93 Md. 285.[1] (3) If the dividend represents earnings, all of which have accumulated during the running of the life estate, it will go to the life tenant whether payable in stock or in cash. *Safe Deposit and Trust Co. v. White* (*Coast Line Dividend Cases*), 102 Md. 73.

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[1]Of course, the instrument creating the trust may by its terms give to the life tenant the profits of the trust estate in addition to its income; but in the absence of such a provision, a distribution from the enhanced value of capital assets, as distinguished from a dividend out of earnings, belongs to the corpus of the trust estate and is not income for the life tenant. See the learned opinion in *Ex parte Humbird,* 114 Md. 627; and compare *Smith v. Hooper,* 95 Md. 30.

PART VII.

THE CORPORATION AND THE STATE.

CHAPTER XIX.

STATE CONTROL.

§ 148. **Scope of Part VII.** It is now proposed to consider the body corporate in its relation to the state, and to examine the features of this relationship which are peculiar to corporate personality. The questions involved are largely those of constitutional law, and must be indicated, rather than discussed, in an elementary treatment. In the first place, the state's control of its own corporations differs from that which it may exercise over the creations of other states; and, in the second place, the status of domestic corporations will vary according as they are public, private or *quasi*-public in their nature. In the following sections consideration will first be given to domestic corporations, and the topics examined will be: 1. Repeal and amendment of the charter, including regulation by general law; 2. Taxation; 3. Procedure; 4. Dissolution and forfeiture. Then, so far as relevant, these topics will be considered in connection with foreign corporations. Obviously, this treatment of the subject is not exhaustive.[1]

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[1] No attempt will be made to cover e. g. the subject of federal control over corporations created by the several states. Under its power to regulate interstate and foreign commerce, Congress, through the Interstate Commerce Commission, regulates in many important particulars corporations doing the business of interstate carriers; and a state corporation may be subjected to a federal excise tax upon the doing of business in a corporate capacity. *Flint v. Stone Tracey Co.*, 220 U. S. 107.

§ 149. **Repeal: amendment: regulation.** Comparing the public, the private, and the *quasi*-public (or public service) corporations, the following are distinguishing characteristics:

First. **Public corporations.** We have already seen that a public corporation is one created for governmental purposes; that it is usually a territorial expression; that it is always a state agent; and that the agency is always revocable. As a consequence, the charter of such a corporation may be repealed or amended by the legislature, and its affairs may be regulated without reference to the will or wish of the members or inhabitants. The charter is not a contract, nor does the public corporation ever acquire any contractual rights against the creating state.

In *Meriwether v. Garrett,* 102 U. S. 472, the facts were these: The City of Memphis, being overburdened with debt and pursued by creditors, the General Assembly of Tennessee repealed its charter by an act declaring that all the municipal offices were abolished; that the population within its territorial limits were resolved back into the body of the state; that all power of taxation was withdrawn; and that the public buildings and all property previously used for municipal purposes were transferred to the control of the state. The appellees were holders of a large amount of the city's bonded debt and instituted suit for relief. The court, first of all, announced the general doctrine: "The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated

by text writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them." Then, taking up the argument that notwithstanding the repeal of the charter, the property of the city was responsible for its debts: "What then is the property of a municipal corporation which upon its dissolution a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public. * * * In its streets, wharves, cemeteries, hospitals, court houses and other public buildings, the corporation has no proprietary rights. In the third place, we say that taxes previously levied but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of creditors of the corporation. Taxes are not debts. Neither are taxes liens upon property unless made so by statute. * * * And a repeal of the law under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax unless provision for its continuance is made in the repealing Act. * * * We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract.

It is not of such taxes, constituting the consideration of contracts that we are speaking. * * * To return to the question propounded what is the property of a municipal corporation, which, on its dissolution, the courts can reach and apply to the payment of its debts,—we answer, it is the private property of the corporation; that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose."[1] Nearly as broad is the state's power of regulation; and, unless emancipated by constitutional provision, a public corporation has few rights which the legislature is bound to respect. A municipality may be required to support a police force which is appointed and controlled by the state,—*Baltimore v. State,* 15 Md. 376; to pay the cost of supporting its habitual drunkards at a private reformatory,—*Baltimore v. Keeley Institute,* 81 Md. 106; to purchase a private bridge connecting the municipality with an adjoining county,—*Pumphrey v. Baltimore,* 47 Md. 145; to maintain a bridge located beyond its territorial limits if this would be for the advantage of its inhabitants,—*Talbot County v. Queen Anne's County,* 50 Md. 259.[2]

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[1] The court further held, as a matter of course, that the private property of the citizens of Memphis was not liable for its debts. So long as there are municipal authorities clothed with power to levy the taxes, creditors can by mandamus compel performance of the duty. *Graham v. Folsom,* 200 U. S. 248; *Louisiana v. New Orleans,* 215 U. S. 170.

[2] In this case it is said: "It is true, the power of the legislature over these municipal organizations is not without limit under the Constitution of this state, and especially is there a limit in regard to objects dependent upon the exercise of the power of taxation. This limitation is implied from the very nature and objects of the

Second. **Private and quasi-public corporations.** In contrast with the public corporation stand the charters of public service and private companies. These create contracts, and in the absence of a reserved power the state cannot, by subsequent legislation, impair them,—whether the attempt be made directly through repeal or amendment; or indirectly through general legislation. The qualifying principles will be presently noted; the rule and its history are thus stated by Mr. Justice Gray in *Looker v. Maynard,* 179 U. S. 52:

"By the decision in the leading case of *Dartmouth College v. Woodward,* 4 Wheat. 518, it was established that a charter from the state to a private corporation created a contract within the meaning of the clause in the Constitution of the United States forbidding any state to pass any law impairing the obligation of contracts; and consequently that a statute of the state of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void. Mr. Justice Story, in his concurring opinion in that case, after declaring that

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organization. As applied to these sub-divisions of the state, the legislature has no more power to require a tax to be raised in one county to pay for a purely local object in and for another county, than it has to require that the expense of a purely public improvement should be paid by one or a given number of individuals." See further, *New Orleans v. New Orleans Water Co.,* 142 U. S. 79; *Covington v. Kentucky,* 173 U. S. 231; *State v. B. & O. R. R. Co.,* 12 G. & J. 399; *Heiskell v. Baltimore,* 65 Md. 125; *Zeiler v. Railway Co.,* 84 Md. 304; *Queen Anne's County v. Talbot County,* 99 Md. 13; and 48 L. R. A. 465, 53 L. R. A. 837.

in his judgment it was 'perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter,' took occasion to add: 'If the legislature mean to claim such an authority, it must be reserved in the grant.' 4 Wheat. 712. After that decision, many a state of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment, or repeal at the pleasure of the legislature."[1]

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[1] The impairing provision is equally void, although contained in a subsequent Constitution. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

The Maryland Constitution of 1851 provided that all charters thereafter granted should be subject to repeal or alteration at the pleasure of the legislature. This provision was repeated in the subsequent Constitutions, and is to be found in section 48 of Article 3 of the one now in force (1867). An amendment, ratified November 3, 1891, provides: "The General Assembly shall not alter or amend the charter of any corporation existing at the time of the adoption of this Article, or pass any other general or special law for the benefit of such corporation except upon the condition that such corporation shall surrender all claim to exemption from taxation or from the repeal or modification of its charter, and that such corporation shall thereafter hold its charter subject to the provisions of this Constitution; and any corporation chartered by this State which shall accept, use, enjoy or in anywise avail itself of any rights, privileges, or advantages that may hereafter be granted or conferred by any general or special Act, shall be conclusively

The following summary deals with irrepealable charters. In the succeeding section, cases coming under the reserved power will be noted.

A. The legislature cannot, even by express grant, bargain away the police power. A charter, for example, which grants the right to conduct lotteries, is repealable even where no reserved power exists,—*Stone v. Mississippi,* 101 U. S. 814. And so a charter authorizing the manufacture and sale of intoxicating liquor is subject to the operation of a subsequent prohibitory law,—*Boston Beer Co. v. Massachusetts,* 97 U. S. 25.[1] But a lottery grant conferred by the state constitution may not be revoked by the legislature. *New Orleans v. Houston,* 119 U. S. 265.

B. The absence of a reserved power does not take away from the state the right to acquire, by eminent domain, the property of a corporation;[2] nor the right to create a competing corporation, where the first charter confers no exclusive right;[3] nor the power by judicial proceeding to have the charter forfeited, where a cause of forfeiture is shown.[4]

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presumed to have thereby surrendered any exemption from taxation to which it may be entitled under its charter, and shall be thereafter subject to taxation as if no such exemption has been granted by its charter."

[1] And see *Fertilizer Co. v. Hyde Park,* 97 U. S. 659.

[2] *Turnpike Co. v. Railroad Co.,* 81 Md. 247; *Turnpike Co. v. Railroad Co.,* 35 Md. 224.

[3] *Canal Co. v. Railroad Co.* 4 G. & J. 1; *Turnpike Co. v. Railroad Co.,* 10 G. & J. 392; *Turnpike Co. v. State,* 19 Md. 292; *Charles River Bridge v. Warren Bridge,* 11 Pet. 420; and see *Penna. R. R. Co. v. B. & O. R. R. Co.,* 60 Md. 263,—an instructive case.

[4] *Post,* Chapter XXII. While the rule in the *Dartmouth College Case* is still law, the courts are astute to limit immunities and exemptions claimed under an irrepealable charter. See the learned treatment of the subject in Willoughby, Constitutional Law, ch. 48.

C. An irrepealable charter is not necessarily unamendable; but (subject to the exceptions above noted) there can be no amendment which, in any substantial way, interferes with or impairs privileges conferred, and this is so whether they be abridged directly or indirectly,—*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. Under the police power, the state may prescribe all regulations that are fairly necessary to the common welfare. An insurance company, for example, may, notwithstanding its irrepealable charter, be required to furnish reports and submit to examinations, because "if this condition be not necessarily implied, then the creation of corporations with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted."—*Eagle Insurance Co. v. Ohio*, 153 U. S. 446. The point for emphasis is, that the police power, when legitimately invoked, is paramount to the obligation of the contract contained in an irrepealable charter.[1]

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[1] The limitations on the police power vary with the decisions in the several states; and the Supreme Court of the United States has gone far in upholding the state decisions. See *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561; *West Chicago R. Co. v. Illinois*, 201 U. S. 506; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583; and compare *Grand Trunk R. Co. v. South Bend*, 227 U. S. 544.

For the Maryland law, which confines the exercise of the police power within its legitimate limits, see *Northern Central R. Co. v. Baltimore*, 46 Md. 425; *Lake Roland R. Co. v. Baltimore*, 77 Md. 352; *Baltimore v. Cowen*, 88 Md. 447; *Frostburg v. Wineland*, 98 Md. 239; *B. & O. R. Co. v. Baltimore*, 98 Md. 535; *B. & O. R. Co. v. Waters*, 105 Md. 396; *State v. Potomac Coal Co.*, 116 Md. 381; and with the doctrine of these cases compare *Cincinnati &c. R. Co. v. Connersville*, 218 U. S. 336.

§ 150. **Where the power to repeal, amend and regulate has been reserved. Repeal.** With the first of these powers there is practically little difficulty. While the property of a corporation, acquired under its charter, cannot be confiscated by a repeal,[1] nevertheless, the state can take away what it has granted,—namely, the corporate existence and the franchises that are essentially corporate. **Amendment.** The right of amendment is not absolute. Withdrawing the charter leaves to the stockholders at least the assets which are not corporate in character; compelling the corporation to continue under new and more burdensome conditions may exhaust the assets and leave the stockholders nothing. The state "could not, under the guise of an amendment, substitute a new and different charter with distinct and different purposes and oblige the stockholders to accept it. Nor could it divest property rights acquired under the legitimate exercise of the powers granted. Independent altogether of the contract clause of the Federal Constitution is the provision which declares that no one shall be deprived of his property without due process of law."[2] "The state may take away, or it may modify, that which it has granted but that is all. Property acquired during the exercise of these powers it may not divest, contracts already executed it may not annul * * * and the legislation

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[1] *Greenwood v. Union Freight Co.*, 105 U. S. 20; *Minneapolis v. Minneapolis Railway Co.*, 215 U. S. 430; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255,—cited with approval in *Owensboro v. Cumberland T. & T. Co.*, 230 U. S. 58.

[2] *Webster v. Cambridge Seminary*, 78 Md. 206; see, further, *Sprigg v. W. Union Co.*, 46 Md. 78; *Jackson v. Walsh*, 75 Md. 304; *Phinney v. Hospital*, 88 Md. 638.

thus attempted must be prospective and not retrospective in its operation."[1] **Regulation.** Broadly speaking, it may be said that the right of the state to regulate the conduct of its public corporations is unlimited; and that, on the other hand, there can be no meddling with the business of a private corporation merely because such business is carried on corporately. The latter statement does not mean, however, that a provision which will be valid as a charter amendment may not take the form of general legislation.[2] **Public callings.** Whether carried on by a natural or by a fictitious person, any business which is affected with a public interest may, through the police power, be regulated in the interest of the public.[3] For the most part, public callings are carried on by public service corporations; and legislative regulation is directed towards securing from them efficient and non-discriminatory service at reasonable rates. Through the Interstate Commerce Commission, Congress thus regulates interstate carriers; and to public service commissions, under various titles, many of the states have delegated a more or less extensive supervision of public callings

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[1] I Rose's Notes U. S. Rep. 942; and see the learned opinion in *Garey v. St. Joe Mining Co.*, 12 L. R. A. (N. S.) 555. Nor can the state, under the guise of a charter amendment, accomplish what would be unlawful by direct legislation. *State v. C. & P. R. Co.*, 105 Md. 488; *State v. Potomac Coal Co.*, 116 Md. 381; and see *Anne Arundel County v. United Railways Co.*, 109 Md. 377; and compare *Fairhaven R. Co. v. New Haven*, 203 U. S. 379.

[2] *Anne Arundel County v. United Railways Co.*, 109 Md. 377, and *Berea College v. Kentucky*, 211 U. S. 45.

[3] For public callings, see *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Engel v. O'Malley*, 219 U. S. 128.

generally.[1] Such delegation to commissions of functions which are in greater or less degree judicial, *and* legislative *and* executive,—has produced a large and increasing amount of litigation, with a corresponding output of decisions and general literature, legal and economic. What is a proper method of valuation for rate-making purposes? Is a given rate, or a regulation prescribed for more efficient service, reasonable, doubtful, or confiscatory? Does such a rate or regulation directly burden interstate commerce? These are questions of constitutional rather than of corporation law, because the answers do not depend upon whether the calling to be regulated is exercised by a corporation. The answers, of course, depend upon the powers conferred upon the particular commission, and whether, in the exercise of such powers, some constitutional guaranty has been infringed.

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[1] The Maryland Act is that of 1910, Chapter 180,—as to which see *C. & S. R. Co. v. Wash., Westminster R. R. Co.*, 120 Md. 142; *Laird v. B. & O. R. Co.*, 121 Md. 179; *Gregg v. Laird*, 121 Md. 1.

Where the corporation is engaged in interstate commerce, there arises the inevitable conflict between state and federal control,—for a delicate treatment of which see the *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352; and compare *State v. C. & P. R. Co.*, 105 Md. 488. For state attempts to regulate, under the police power, the service of interstate carriers, see *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, and the cases therein reviewed.

CHAPTER XX.

TAXATION.

§ 151. **Introductory.** A corporation may, of course, be assessed for its property to the same extent, and the tax thereon may be levied and collected in the same way that would be followed if the owner were a natural person; and this is a usual method of dealing with corporations having no capital stock. But, considered as subjects of taxation, a natural person and a corporation differ in this: the corporation may have issued shares of stock; and it is the owner of a franchise, i. e. the right to be, and exercise and enjoy the powers granted by the charter. Taking, for illustration, the business corporation, you find three elements of value in or incident to it: the corporate assets, the franchise[1] and the shares,—which last are rights in, but not of, the corporation. Are these distinct taxable values or merely different forms of the same property? If the organic law of the state forbids double taxation, may any more than one of these values be taxed at the same time? If an irrepeal-

[1] It is important to distinguish between the *corporate* franchise, as defined in the text, and so-called special franchises, such as the right of a public service corporation to use the streets of a municipality. The latter may conceivably be enjoyed by a natural person. A street franchise, when exercised, is an easement and is taxable as real property. *Consolidated Gas Co. v. Baltimore,* 101 Md. 541: 105 Md. 43; *United Railways Co. v. Baltimore,* 111 Md. 265.

able charter exempts one, may a tax be laid on one or both of the others? Is a franchise, property, within the meaning of a constitutional provision requiring uniformity in the taxation of property? When will a tax amount to an unlawful interference with interstate commerce? These are the main questions involved in the perennial conflict between legislation, usually crude and drastic, on the one hand, and the tax-dodging instinct on the other. The chief results of this conflict will be noted in broad outline; but first something must be said of two matters which underlie the whole discussion. The nature of share property and of corporate assets is easy to grasp; but what is the nature and measure of taxable value in a franchise? What is meant by the requirement that taxation shall be uniform and not double or unequal?

First. The value of all the outstanding shares may be something more than the difference between the assets and the debts of the corporation. This margin may be little or great; it may represent nothing more than the elements of good will and business capacity, or it may express the value of peculiar privileges and exemptions. In any case, this margin will represent substantially the value of the franchise, taxable as incorporeal property having its situs in the creating state.[1] Usually, however, the case is not so simple. In the laudable effort to sustain the taxing power, the courts, departing from earlier views, have treated the value of the franchise as measurable by its exercise,—for example, by the gross receipts; and have thus, by indirection, made gross receipts taxable, where a direct tax thereon would violate the rule of uniformity or the commerce clause of the Federal Constitution. *U. S. Express Co. v. Minnesota,* 223 U. S.

[1] Compare *State Railroad Tax Cases,* 92 U. S. 575.

335. In *State v. C. & P. R. Co.*, 40 Md. 22, there was an act imposing upon the appellee a tax of two cents per ton upon all the coal mined in the state and transported to any place in the state or elsewhere. It was held by a divided court: that whether regarded as a direct tax on the coal, or as a tax on the franchise, it was imposed upon property without regard to uniformity, and was void under the accepted construction of the fifteenth article of the Bill of Rights. In *State v. P. W. & B. R. R. Co.*, 45 Md. 376, the dissenting view of the earlier case prevailed. In this case there was an act imposing upon the appellee a tax upon its gross receipts, namely "one-half of one per cent. on the same proportion of the whole gross receipts of the road, as the length of the company's track in Maryland bore to the whole length of the road, which ran through the states of Maryland, Delaware and Pennsylvania." In answer to the contention that the Bill of Rights requires all property in Maryland to be taxed uniformly, the court said: "A franchise is a special privilege conferred by the State on certain persons and which does not belong to them of common right, and although the franchises of a company may be considered in one sense property, and valuable property, yet they are not property in the meaning of that term as used in the Bill of Rights." And again, in answer to the objection that the tax was imposed upon transportation and therefore in conflict with the commerce clause of the Federal Constitution, it was said that the tax imposed was a franchise tax; that the gross receipts were not the subject of the tax but merely the measure of the tax on the franchise.[1]

Second. Double or unequal taxation is forbidden and

[1] See the dissenting opinion of Judge Alvey, for the earlier Maryland view.

uniformity is enjoined, expressly or by judicial construction, in the organic law of most of the states.[1] But with the need for a broader exercise of the taxing power, a change has come over the judicial interpretation of these guaranties. In an earlier view, regard was had to the thing itself, without reference to the fact that different persons might have different interests in the same thing; and a tax was double if the same thing was compelled to pay twice. The modern test is different, namely whether the owner pays twice by reason of his ownership of the same property.[2] For example, one man may own the land and another may be the holder of a mortgage on that same land for its entire worth. These are distinct values and a tax on both the land and the mortgage is not a double tax. *Allen v. Bank*, 92 Md. 509.

So with regard to uniformity. In the former view no tax could be imposed upon one kind of property "which is not equally borne by every other species of property in the state in proportion to its value."[3] The modern test is whether the tax is uniform on all property of the same class,—and not whether it is imposed equally upon everything that is the subject of ownership. The later view is well put in *Pacific Express Co. v. Seibert*, 142 U. S. 351: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed, and the various species of property selected either for bear-

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[1] In Maryland, by construction,—*State v. Sterling*, 20 Md. 502; *Frederick County v. Bank*, 48 Md. 119. See, now: *Wilkins Co. v. Baltimore*, 103 Md. 293; and *post*, § 152.

[2] *U. S. Elec. Co. v. State*, 79 Md. 71; but an owner may be taxed for the same value both by the state of the situs and the state of the owner's domicil. *Coe v. Errol*, 116 U. S. 517; *Corry v. Baltimore*, 196 U. S. 466; Willoughby on the Constitution, secs. 533 and 541.

[3] *Baltimore v. R. R. Co.*, 6 Gill, 291

ing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms."[1]

§ 152. **Taxation of domestic corporations.** In the light of the foregoing principles, an examination will now be made of some results established by the weight of authority.

First. **Fundamental principles.** (a) Corporations are persons within the Fourteenth Amendment, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. "This imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. It implies * * * also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid."[2]

(b) While a state may not, directly or indirectly, burden interstate commerce, or tax the privilege of carrying it on,[3] it may by a general property tax reach the instrumentalities of that commerce, situated within its borders. And this is so, whether the interstate corporation is foreign or domestic.[4]

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[1] To the same effect is *Simpson v. Hopkins,* 82 Md. 488; and see *Baltimore v. Starr Church,* 106 Md. 287.

[2] Per Field, J. in *San Mateo v. Southern Pacific R. Co.,* 13 Fed. 722; *Santa Clara Co. v. Southern Pacific R. Co.,* 118 U. S. 394.

[3] *Galveston R. Co. v. Texas,* 210 U. S. 217; *U. S. Express Co. v. Minnesota,* 223 U. S. 335,—with which compare *Baltic Mining Co. v. Mass.,* 231 U. S. 68.

[4] *Pullman Co. v. Pennsylvania,* 141 U. S. 18.

(c) Tangible property beyond the limits of a state can not be taxed by it, nor included in the valuation of shares where the corporation is taxed on such valuation. *Delaware R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerating Co. v. Kentucky,* 199 U. S. 194. Nor can a state tax a franchise which it did not grant. *California v. Central Pacific R. Co.,* 127 U. S. 1; *Ferry Co. v. Kentucky,* 188 U. S. 385.[1]

(d) Where shares are assessed to the owners, they may be taxed at their real value, although this may be produced by property beyond the jurisdiction or not otherwise taxable. *Crown Cork & Seal Co. v. State,* 87 Md. 687; *Allegany Co. v. American Coal Co.,* 59 Md. 185.

(e) While a state cannot tax personal property beyond its limits or franchises which it did not grant, nevertheless, property within the limits may be valued, not at its intrinsic worth, but as a proportionate contributing factor to the total worth of the corporation.[2]

(f) "It is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them (i. e. franchises, corporate property and shares) in a way to subject the corporation or the stockholders to double taxation."[3]

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[1] For the conflicting decisions as to the situs for taxation of intangible property, such as bonds, mortgages and credits generally,—see Willoughby on the Constitution, sec. 539 *et seq.*

[2] This is the so-called "unity of use" rule, which was carried to an extreme in *Adams Express Co. v. Ohio,* 165 U. S. 194 and *Western Union T. Co. v. Missouri,* 190 U. S. 412. The rule applies where the corporation, domestic or foreign, operates in several states. For the limitations, see Willoughby on the Constitution, sec. 536.

[3] *Tennessee v. Whitworth,* 117 U. S. 129. But double taxation, i. e. assessing the same owner twice for the same value, would seem to be prohibited by the Fourteenth Amendment, unless all property were similarly treated. See *post,* Double Taxation.

Second. **Double taxation.** It was once a received doctrine that the shares and the corporate assets,—that is to say, the franchise, the capital stock (*i. e.* stock capital), and the surplus, were not different values but merely different aspects of the same value. The shareholders were regarded as contributors to a common stock, which the corporation held in trust for them. The doctrine found clear and distinct expression in the earlier cases; and it was settled law that taxing both the corporate assets and the shares would be taxing the same value twice, and therefore double taxation. Subsequently, the point of view changed. Double taxation has come to mean a second taxing by the same taxing power of the same value in the hands of the same person; and the shares in the hands of the holder are treated as concrete things—*quasi*-obligations of the corporate entity which is a sort of non-conductor between the shareholders and the corporate assets. The change in the point of view is responsible for much discord in the modern decisions. Instead of frankly abandoning the earlier principle (except where, in the case of particular corporations, the matter had become *res adjudicata*), many courts have ignored it. In *Shelby Co. v. Bank,* 161 U. S. 154, for example, it is said of the corporate property and the shares: "So separate are these properties, and so distinct in their nature, that the taxation of the one property is not the taxation of the other." And an earlier case (*Gordon v. Appeal Tax Court,* 44 U. S. 133), which decides the contrary, is disposed of by saying that it merely "lends some color to the claim."[1]

[1] Note in *Wilkins Co. v. Baltimore,* 103 Md. 313, which was correctly decided, the reference to the doctrine of *Baltimore v. B. & O. R. Co.,* 6 Gill, 221, *State v. C. & P. R. Co.,* 40 Md. 52, *Frederick Co. v. Bank,* 48 Md. 117, and *State v. Wilson,* 52 Md. 640.

Third. **Exemptions.** The confusion caused by the change of view just discussed, is well illustrated by cases involving exemptions from taxation contained in irrepealable charters. Properly, the courts respect the earlier decisions as *res adjudicata*, but, with equal propriety, refuse to extend the immunities beyond the fairly necessary purport of the language used. Where the shares are "exempt from the imposition of any tax or burden," the corporate property, to the extent that it is an instrumentality of the charter purpose, is exempt. *Baltimore v. B. & O. R. Co.*, 6 Gill 292; *State v. B. & O. R. Co.*, 48 Md. 49. And where shares are exempt, no franchise tax, measured by gross receipts, can be imposed. *State v. B. & O. R. Co.*, 48 Md. 49. Where no irrepealable charter or prior adjudication is involved, the modern view prevails. In *U. S. Electric Co. v. State*, 79 Md. 63, there was imposed upon the appellant a franchise tax measured by its gross receipts, and its shares were also taxed in the hands of the holders. This was held not to be double taxation, because the "franchise or right, though property, is the property of the artificial body as a body corporate," and a tax upon the shares is not a tax upon the corporation, but upon the owners of the shares.[1]

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[1] See also, *Wilkins Co. v. Baltimore*, 103 Md. 313. Much mental agility has been displayed by the federal Supreme Court in determining whether new schemes of taxation impair the contract exemptions of irrepealable charters. A reasonable doubt is, and should be, fatal to the exemption; but sometimes the doubt is created by wresting words from their contemporaneous meaning, in distinguishing finely between the capital stock (the subscribed capital and its investment), the surplus, and the shares. See *Wright v. Georgia R. & B. Co.*, 216 U. S. 420; the *Tennessee cases*, 161 U. S. 134-200; *Bank v. Memphis*, 189 U. S. 71.

Fourth. **License and privilege taxes.** The state may and usually does require the payment, upon incorporation, of a bonus or organization tax; so a charge may be made for the right to engage in particular occupations; or for the right to use the public streets and highways. Such impositions, usually called license, occupation or privilege taxes, are permissible where they do not unduly burden interstate commerce or deny the equal protection of the laws; but they are not, although sometimes so called, taxes on the franchise, or the business, or the property of the corporation.[1]

Fifth. **Situs of share property.** Tangible personal property is taxable only where found; and while, as a rule, intangibles follow the domicil of the owner, the rule is subject to increasing exceptions.[2] The mortgage debt may be taxed where the land lies,—*Allen v. Bank,* 92 Md. 509; and a non-resident shareholder is presumed to have assented to a law of the corporation's domicil making the shares taxable there.[3]

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[1] For illustration: In *Postal T. Co. v. Baltimore* 79 Md. 502, affirmed in 156 U. S. 210, a tax imposed by ordinance of two dollars "on each telegraph, telephone, electric light or other pole which shall be used in any of the streets, lanes or alleys of the city," was upheld as compensation for the use of the city streets, although the appellant was a foreign corporation engaged in a "species of interstate commerce." To the same effect are *Western Union T. Co. v. New Hope,* 187 U. S. 419; *A. & P. T. Co. v. Philadelphia,* 190 U. S. 160; *Western Union T. Co. v. Richmond,* 224 U. S. 160. The tax must be proportionate to the cost of supervision and inspection. *Postal T. Co. v. New Hope,* 192 U. S. 55.

[2] Willoughby on the Constitution, sec. 359 *et seq.*

[3] *Corry v. Baltimore,* 96 Md. 310; 196 U. S. 466. As among the taxing jurisdictions of Maryland, the tax is payable where the resident owner resides; and a statute to the contrary is unconsti-

§ 153. **Taxation methods in Maryland.** Each state has its own peculiar, and more or less unstable scheme for taxing the corporations. Reserving for future reference the case of national banks and foreign corporations, a brief noting will be made of the method in vogue in Maryland.

First. **Exemptions.** Certain property, real and personal, of religious bodies; cemetery companies not run for profit; hospitals, asylums, charitable and benevolent institutions; and *incorporated* educational and literary institutions is exempted. A number of cases arising under similar exemptions contained in prior laws have established this general result: such exemptions are strictly construed; they will not by implication be extended to such property as is used for revenue purposes; nor to invested capital and securities.[1]

Second. **Non-stock corporations.** All other corporations of the state which are subject to taxation may, from the present standpoint, be divided into two classes,—those having a capital stock and those having none. Unless belonging to one of the special classes hereafter mentioned, the latter are treated for purposes of taxation as natural persons.

Third. **Share companies.** In the case of corporations having a capital stock, except those belonging to one of the

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tutional. *Baltimore v. Allegany Co.*, 99 Md. 1. And where shares are held in trust, the residence of the beneficiary governs. *Baltimore v. Safe Deposit Co.*, 97 Md. 659 (construing and upholding the Act of 1902, Chapter 486, which changed the rule laid down in *Latrobe v. Baltimore*, 19 Md. 13). For the place where the tax due by a non-resident owner is payable, see § 153.

[1] See, for a full account, Code (1911), Art. 81, sec. 4, and the valuable annotations. See also *Baltimore v. Starr Church*, 106 Md. 281.

special classes presently noticed, the scheme (Code 1911, Art. 81, secs. 151 and following), is this: Every such corporation is required to return to the State Tax Commissioner annually before the fifteenth day of March in each year, specific answers to such questions touching the business and assets as will enable the Commissioner to ascertain the fair value of the shares. For its real estate, if any, the corporation is assessed in the city or county where the same is located; state and local taxes are paid thereon as if the owner were a natural person; and a certificate showing the value of the real estate assessed to the corporation is sent to the Commissioner with its report. From the aggregate value of all the shares are deducted the assessed value of the corporate real estate and such other assets as are exempt—for example, government or municipal securities[1] —or those which are otherwise taxed, such as the shares of other corporations actually owned. In assessing the shares, it is provided that "in no case shall the stock of any corporation in the aggregate be valued at less than the full value of the real estate and chattels, real and personal, held by or belonging to such corporation in the several counties and city of Baltimore, whether the shares of said stock are quoted on the market or not."[2] The net value of all the

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[1] See *Schley v. Lee*, 106 Md. 395, in connection with the subsequent Act of 1908, ch. 124: Code (1911) Art. 81, sec. 163. And note the former and useless provision for reports to the State Tax Commissioner by non-stock companies. For the plant exemption in Baltimore City, see Art. 81, sec. 164.

[2] The Maryland method of taxing shares is an evolution; and some provisions of the Statute have come over from earlier statutes under which the corporation was taxed directly. It is settled, by judicial decision, that under the present method the shares are assessed and taxed to the owner (*Wilkins Co. v. Balto.*, 103 Md.

shares, after deducting exemptions, and proper allowances, is divided by the number of shares and the quotient is the *taxable* value of each. In theory, these are assessed to the respective holders and taxed, just as any other item of personal property owned by them would be,—for state purposes and according to the local rate of the city or county in which the owner resides. Under the statute, the corporation is required to pay the tax for the shareholder, charging the same to his account;[1] and it is made the duty of the corporate officers to furnish on or before the first of March in each year to the County Commissioners and to the Appeal Tax Court a list of the stockholders resident in the particular county or in the city of Baltimore.

When the Commissioner has assessed the shares for tax-

293, and the cases therein reviewed)—notwithstanding the fact that the tax becomes a debt of the corporation, payable without regard to whether there are or are not dividends from which the payment could be deducted. But if the shares are really taxed as a value in the hands of the owner, it would seem difficult to treat as applicable to *shares*, the provision (Art. 81, sec. 159) that "in no case shall the *stock* of any corporation in the aggregate be valued at less than the full value of the real estate and chattels, real and personal." This is proper enough if the tax is assessed against the corporation on the value of its capital stock,—as held in *Delaware &c. R. Co. v. Penna.*, 198 U. S. at 357. But where the corporation has a bonded debt, the aggregate value of its shares may be less than the sum of its real and personal property; and if the tax is really on the share in the shareholder's hands it can hardly be assessed for more than its actual value. This would seem to be indicated by the words "actual cash value" also found in sec. 159. The case just cited illustrates the importance of the distinction.

[1] The tax is a debt due by the corporation—*Casualty Ins. Co.'s Case*, 82 Md. at 564-5—whether dividends are paid or not; but the property of the corporation cannot be distrained for non-payment. *Hull v. So. Devel. Co.*, 89 Md. 8.

ation, he certifies and returns his valuation to the Comptroller, who is required to transmit notice to the corporation; an appeal may be taken by the corporation within thirty days from such transmission, to the Comptroller and State Treasurer; and, in default of appeal, the assessment becomes final.[1] These provisions have given rise to a considerable amount of litigation, of which the following are the principal results: (1) Unissued shares are not subject to taxation,—*Union Trust Co. v. State,* 116 Md. 368; *Consumers' Ice Co. v. State,* 82 Md. 132. (2) In valuing the shares, the Commissioner may include real property of the corporation which is located beyond the state—*Am. Coal Co. v. Allegany Co.,* 59 Md. 194; and also patent rights, which are not in themselves taxable—*Crown Cork & Seal Co. v. State,* 87 Md. 687. (3) The state tax imposed on the shares is due and payable on November first of the current year. *State v. Safe Deposit & Trust Co.,* 86 Md. 582; and the valuation is as of the preceding first day of January—Union *Trust Co. v. State,* 116 Md. 368. (4) Shares held by residents of the state are assessed to the owner in the county or city in which he resides;[2] but foreign held shares in domestic corporations are governed by special provisions. Under Art. 81, sec. 150, the situs of shares in "banking, insurance or other corporations usually termed moneyed institutions," is the place of the principal office for the transaction of business; and so in the case of "turnpike, railroad, steamboat, canal or other improvement corporations"; but the situs for taxation of foreign held shares in "mining, manu-

[1] The Act of 1900 ch. 399 purports to give an appeal to the Mayor and City Council of Baltimore, but not to any county or other city.

[2] See *Frederick County v. Frederick City,* 88 Md. 654 for a conflict between a county and a municipality included therein.

facturing or other like corporations" is "situate at the place where the works of such corporation or the greater part of their operations respectively shall be conducted."

Fourth. **Special Classes.** (1) **Railroads,** domestic and foreign, pay to the state a franchise tax measured by gross receipts; and where a road extends beyond the limits of the state, such proportion of its entire receipts is taken as the basis for the tax, as the mileage in the state bears to the whole length of the line. For purposes of county and municipal taxation, the property of the railroad company, real and personal, is assessed and taxed as if it belonged to a natural person; but special provision is made that bridges and tunnels shall be valued no higher than as part of the road-bed; and that the situs of the rolling stock for taxation, shall be, presumptively, in the assessment district of the principal place of business,—subject to a mileage apportionment where the line extends beyond the state, and to a similar apportionment among the several counties and the city of Baltimore through which the road may run. An important distinction is drawn between railroads and other corporations upon which a gross receipts tax is imposed: "Where such respective railroad companies are subject to such gross receipts tax for state purposes, their shares of stock and real or personal property shall not be subject to taxation for state purposes, and when such real and personal property of such respective railroad companies is subject to county and municipal taxation, their respective shares of stock shall not be subject to county and municipal taxation, but the capital stock and property of all other corporations which are subject to a tax upon their gross receipts, other than railroad companies, shall be valued, assessed and taxed for state, county and municipal purposes like the capital

stock and property of other corporations under this Article."[1]

(2) **Savings Banks,** institutions or corporations organized for receiving money on deposit and paying interest thereon, are charged annually with a franchise tax in lieu of all execpt real estate taxes, of one-quarter of one per cent. on the total deposits held as of the preceding first day of January; and this tax is apportioned, one-quarter to the Treasurer of Maryland for the state tax and the other three-quarters to the county or city in which the institution is situated.[2] Prior to the Act of 1888, ch. 242, the statute did not in terms designate the tax as one upon the franchise, nor did it provide that it should be in lieu of other taxation. In *State v. Central Savings Bank,* 67 Md. 290, the question arose whether, in its taxable deposits, the appellee could be required to include the value of ground rents in which its deposits were in part invested. The court, struggling with the doctrine of double taxation, held with apparent reluctance, that the deposits invested in ground rents were exempt. Subsquently, by the amendment of 1888, ch. 242, the tax was declared to be a franchise tax; and it was provided: "No other tax shall be laid on such bank, institution or corporation in respect to such deposits, but the real property of any such savings bank, institution or corporation shall be liable to assessment and taxation as other real property belonging to other corporations in this state." By the Act of 1890, ch.

[1] Code (1911) Art. 81, secs. 162, 167. Sec. 170 provides: The term "gross receipts * * * shall not include any income derived from the investment of the capital or surplus of any of the corporations mentioned in said section, and in the case of the use of monies received or deposited, they shall include only the difference between the receipts, earnings or revenues derived from the use of such deposited monies, and the interest paid on such deposits."

[2] Code (1911) Art. 81, sec. 91.

491 (Code 1911, Art. 81, sec. 92), there was added a further provision, namely, that nothing in the law should "be construed as granting exemption from taxation to the shares of any bank or any other corporation, or to any other property taxable under the laws of this state, by reason of or on account of its ownership by a savings bank, institution or corporation of this state."

In this condition of the law arose the case of *Westminster v. Westminster Savings Bank,* 92 Md. 62,—where the question was, whether having paid the tax upon its deposits, the corporation could be taxed for the shares of its capital stock,[1] and also on the securities in which its deposits were invested. The court held: (*a*) that the effect of the amendment of 1890 was not to make the securities taxable *in the hands of the bank,* but simply to prevent a deduction of such securities in ascertaining the amount of deposits subject to the tax; and (*b*) that the shares of the bank were assessable and taxable in the same manner as the capital stock of any other corporation of the state.[2]

(3) **Telegraph.** cable, express, transportation, telephone, parlor car, sleeping car, safe deposit, trust, guarantee and fidelity, oil pipe line, title insurance, electric light, electric construction, gas, guano, phosphate and fertilizer companies

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[1] It is said in *State v. Central Savings Bank, supra,* that "savings banks are not banks of discount nor have they any capital stock." This is the true conception of such institutions, but singularly enough, the former general incorporation law provided that "the capital stock of any such corporation shall not exceed one million dollars." The Act of 1910, ch. 219 Code Art. 11, sec. 32, provides that savings banks thereafter incorporated shall not have any capital stock, but that existing savings institutions which have a capital stock may increase the same.

[2] See *Baltimore v. State,* 105 Md. 6.

are required to pay a state tax as a franchise tax upon gross receipts. The amount varies with the particular class and the shares are assessed and taxed as those of any other domestic corporation would be.[1]

(4) **Banks** incorporated by this state are, as to the valuation and assessment of their shares for taxation, placed on the same footing with national banks. The taxing laws governing these will be referred to hereafter.[2]

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[1] Code (1911) Art. 81, secs. 162, 167,—which further provides that "All the provisions and requirements of this section (as amended) shall be in force and applied to all corporations of a like kind to those enumerated above which are doing business in this State, and which are incorporated by or under the laws of any other State, District, territory or foreign country. Every unincorporated association, partnership or individual engaged in any one or more of the above specially enumerated branches of business in this State, except guano, phosphate and fertilizer companies shall be subject to said gross receipts tax, and shall comply with all the provisions of this article with reference thereto as fully as if such association, partnership or individual was a corporation." In *State v. U. S. Fidelity Co.*, 93 Md. 315, it was held that "gross receipts" means receipts from business done in this State only; and see *State v. Central Trust Co.*, 106 Md. 268. A gross receipts tax will be void as a burden on interstate commerce, if it is a tax on gross receipts as such and not a property tax fairly measured by them. See *U. S. Express Co. v. Minn.*, 223 U. S. at 345-6; and the *Texas and Oklahoma cases* therein reviewed. The tax held void in the former case was imposed in addition to a full property tax.

[2] Code (1911) Art. 81, sec. 217.

CHAPTER XXI.

MATTERS OF PROCEDURE.

§ 154. **Introductory.** Viewed as a litigant, the fictitious person was the cause of much trouble in the earlier law. How can it be brought before the court, or enter such pleas as must be pleaded in person; where is its domicil for the purpose of suit; how are the court's orders against it enforced; who is responsible for its contempts? Partly by judicial decision and largely by statute these questions have been answered in such a way that, for most purposes of legal procedure, the corporate entity is merged in its governing body. They act indeed in its name, but its acts and defaults are attributed to them, on the theory of identity rather than agency. In previous chapters sufficient reference has been made to the historical phase of the subject; and it now remains to consider some procedural peculiarities which have their explanation in fictitious personality, and are today of practical importance.

§ 155. **The corporate name.** Formerly there was much and subtle debate as to how far one might risk a misnomer in conveyance, contract or plea,—without fatal results. The name was not only "the knot of the combination," but it was the conclusive evidence of identity; there was no such thing as having the right corporation by the wrong name. The technicality of the earlier law was first relaxed in cases of grant, devise and bequest, and later in the domain of

contract; and the established rule became and now is that identity and not precision of name is what counts.[1]

In procedural law, the old rule of verbal accuracy retained its vigor for a long time, and it continued to be a source of difficulty and annoyance until the introduction of the modern reforms in pleading. A misnomer is still a ground for a plea in abatement and it will constitute a variance between the *allegata* and the *probata*. But where as in Maryland, a liberal right of amendment exists, and where no motion in arrest of judgment can be made for a cause of demurrer, the path of the pleader is as a shining light. Moreover, even in pleading, the established tendency is to apply the test of identity as in the case of deeds, grants and contracts. In *Western Union Tel. Co. v. State,* 82 Md. 293, the writ of summons and the declaration referred to the defendant as the Western Union Telegraph Company; and in the bill of particulars filed with the declaration, the words "a corporation of the State of New York" were added. It appeared during the trial that there were two corporations, one existing under the laws of New York, and known as The Western Union Telegraph Company, and a corporation of Maryland known as The Western Union Telegraph Company of Baltimore City. The Maryland company was the one intended to be sued, and leave to amend being granted, the question was whether the amendment brought in a new party and enabled it to plead limitations. The court held that the effect of the amendment was simply to correct the

[1] *Reilly v. Union Prot. Infirmary,* 87 Md. 664, where the appellee was allowed to take a bequest to "The Presbyterian Infirmary on Division Street in the City of Baltimore." In *The Case of Lynn,* 10 Coke, 125*b*, it is said: "That for every curious or nice misnomer, God forbid that their leases, grants, etc., should be defeated; for there will be found a difference betwixt writs and grants."

name of a party actually summoned,—it appearing that the person upon whom the writ of summons was served was the general manager of both corporations. So, in *Watts v. Port Deposit*, 46 Md. 500, a judgment had been recovered against "The President and Commissioners of the village of Port Deposit." After suit brought, and before judgment rendered, the name of the town was changed by the legislature to the "President and Commissioners of Port Deposit," and the contention was made that this created a new corporation upon which the judgment was not binding. The court held that the change was one of name only and not of identity, and that the judgment was enforceable.[1]

§ 156. **Process.** The place within the state where its corporations may be sued, and the persons upon whom a valid service of the writ of summons may be made, are matters usually covered by statute. The situation in Maryland, prior to the Act of 1908, was complicated by piecemeal legislation, and it will be seen from the cases in the note[2] that most of the difficulties arose: (1) from the fact that the

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[1] For what constitutes a variance, compare *Baltimore Cemetery v. First Independent Church*, 13 Md. 117 and *Coulter v. Western Seminary*, 29 Md. 69. The objection in both cases was raised by motion in arrest and, under the former practice, this was a serious matter.

Code (1911) Art. 23, sec. 88, provides as follows: "It shall be sufficient in any suit, pleading or process, either at law or in equity or before a justice of the peace against any corporation, to describe it by the name or title by which it is commonly known or by or under which its business is transacted." See also Code (1911), Art. 75, sec. 37.

[2] *Baltimore &c. Turnpike Road v. Crowther*, 63 Md. 558; *Henderson v. Insurance Co.*, 90 Md. 47; *Girard Insurance Co. v. Bankard*, 107 Md. 540; and see the annotations, Code (1911) Art. 23, sec. 87. A municipal corporation may not, in a transitory action be sued beyond its limits. *Phillips v. Balto.*, 110 Md 431.

legislation drew a distinction between corporations formed under the general law and those created by special charter; (2) from the fact that the courts refused to apply to a corporation the statutory provisions relating to a natural person; (3) and from the fact that amendatory statutes had not proceeded upon any logical and consistent principle, but made special provisions for special classes of corporations.

The Act of 1908, ch. 240, Code 1911, Art. 23, sec. 87, now provides:

"Process issued by any court or justice of the peace of this state against any corporation thereof may be served on any president, director, manager, or other officer; and if none reside in this state, such corporation may be proceeded against by attachment as a non-resident, or such process may be served on any agent, or other person in the service of the corporation; provided, that in all cases mentioned in this section, the officer serving process shall leave a copy thereof with the person upon whom it is served. Every corporation of this state may be sued in any county or in the city of Baltimore, as the case may be, where its principal office is located, or where it regularly transacts business or exercises its franchises, or in any local action, where the subject-matter thereof lies; and process against such corporation may be served as is hereinabove provided, and may be directed to the sheriff of any county or of the city of Baltimore, returnable to the clerk of the court out of which same issued. And whenever any corporation of this state has become surety on any bond required by law to be filed in any court thereof or with any register of wills, public board or official—suit against such corporation on such bond may be brought in the city or county where the same is filed."[1]

[1] Note the earlier provisions for insurance and surety companies Code (1911) Art. 75, sec. 23; and for telegraph and express companies, Art. 56, sec. 124.

§ 157. **Pleading and evidence.** Attention has already been called to the use of the seal in pleading; to the rule that the general issue plea puts the incorporation of the plaintiff in issue; and that where the incorporation of the plaintiff is alleged, it will be taken as admitted for the purposes of the particular suit unless denied in the next succeeding pleading. There is little in the rules of evidence peculiar to corporations that has not already been touched upon; the method of proving the by-laws; the force and effect of the minute books as proof; the rule of interpretation whereunder the word person includes a corporation,—these are matters which have been sufficiently considered. In some of the earlier cases, there is announced a peculiar doctrine touching judicial notice of special charters; and it has been held that although the corporation is not a public one, its charter may be so far of a public nature as to require judicial notice by the courts. Thus, where the charter of a bank reserved for the use of the state certain shares of its capital stock, it was held to be a public law of which the court was bound to take judicial notice,—*Towson v. Bank,* 6 H. & J. 47; and so the charter of the "Visitors and Trustees of the Charlotte Hall School," was held to be "considered in the light of a public law,"—*State v. Greenwell,* 4 G. & J., 408. These cases have not been overruled, but they are not to-day of much practical importance.

§ 158. **Execution.** The assets of a private corporation may be taken by creditors for its debts, to the same extent and in the same manner as if it were a natural person. The property of a municipality, held for public purposes, is exempt from seizure; but, in Maryland, the judgment creditor can by writ of mandamus compel the levy of an assessment to pay his debt.[1] To a more limited extent the prop-

[1] Code (1911) Art. 23, sec. 259; *Darling v. Baltimore,* 51 Md. 1.

erty of a public service corporation, namely, that essential to the performance by it of its public duty, is exempt from seizure.[1]

§ 159. **Miscellaneous.** The special procedure relating to the dissolution and winding up of corporations, is considered in the following chapter. By the Act of 1908, ch. 240, (Code 1911, Art. 23 sec. 99), an additional provision is made for the manner in which the deed of a corporation may be acknowledged. By section 292 of the same Article, a special and summary remedy against transportation companies is given to persons who may be aggrieved "by reason of anything done or omitted to be done by the said company in violation or contravention of its duty in regard to the transportation or carriage of property or persons." By section 2 of Article 9, entitled Attachments Against Non-resident and Absconding Debtors, it is provided that: "Any corporation chartered by this state, but not having a president or a majority of the directors or managers thereof residing in this state may be made a defendant as other non-residents." This provision, while not specifically repealed by the Act of 1908, chapter 240, is doubtless superseded by section 87 thereof, above quoted.[2]

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[1] *McColgan v. Balto. Belt R. Co.*, 85 Md. 519; *Brady v. Johnson*, 75 Md. 445,—reported with a valuable note in 20 L. R. A. 737.

[2] *Ante*, §156.

CHAPTER XXII.

DISSOLUTION.

§ 160. **Preface.** In legal theory, the author and finisher of the corporation is the state. Corporate life may expire by lapse of the time for which the charter was granted, or, in a membership corporation, by the loss of sufficient members to keep up the succession; the charter may be forfeited for cause, or it may be surrendered by agreement,—but without the assent of the state, express or implied, corporate life can neither begin nor end. It is true that in most modern systems this assent is given in advance. Courts of equity are usually empowered to enter a decree of dissolution: (a) in a voluntary proceeding by the stockholders; (b) in an involuntary proceeding by a creditor or, in some states, by a shareholder, of an insolvent corporation. It is important, however, to remember the theoretical point of view and its consequences, namely, that the dissolving power of the court is not inherent, but is measured exactly by the terms of the law that confers it.[1] In this chapter particular attention will be given to the subjects of forfeiture, and voluntary and involuntary dissolution as regulated by statute in Maryland,—but first certain general doctrines will be noticed.

First. **Dissolution by loss of membership.** Where by reason of death or resignation, there are not sufficient mem-

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[1] *Mason v. Equitable League*, 77 Md. 484.

bers left to keep up the succession, the corporation is either dead, or, its life is suspended until revived by legislative act.[1] This situation cannot, of course, arise in a share company; and in others the rule is a little difficult of application. It is sometimes said that the loss of all the members or the loss of an "integral part" of the corporation causes its death. The former statement is obviously true, but there is no clear principle announced by the latter. In every corporation, fictitious personality must rest upon some natural persons whose succession is kept up by co-optation or otherwise;[2] and so long as there are a sufficient number of natural persons to replace and restore this integral part, the corporation may be dormant but it is not dead. For example, in Maryland, the trustees of a religious association—and not the members who elect them—constitute the corporation; but no dissolution would result from the death or resignation of all of the trustees. On the other hand, if by charter, the electing body consists of a definite number, a majority is (probably) necessary for a quorum;[3] otherwise, there is no reason why two persons may not hold a meeting.[4]

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[1] *Regents v. Williams*, 9 G. & J. 232; *Vincennes Univ. v Indiana*, 14 How. 268.

[2] *Ante*, §44.

[3] *Regents v. Williams*, 9 G. & J. 232.

[4] In the Roman law, it is said, corporate existence continued so long as there were three members. The Act of 1908 (Code 1911, Art. 23, sec. 98) provides: "Whenever it shall happen in the case of any corporation having a definite number of members and no capital stock, that by death or resignation the membership shall be reduced below a majority of the prescribed number, the corporation shall not on that account be dissolved; but it shall be lawful for the surviving or continuing members so long as the number thereof shall be two or more, to fill vacancies and continue the corporate succession."

Second. **Property rights upon dissolution.** The common law rule was drastic but simple. The real property of the corporation reverts to its immediate grantor or his heirs,—"for the law doth annex a condition to every such grant that if the corporation be dissolved, the grantor shall have the lands again";[1] its goods and chattels vest in the crown as property without an owner[2] and "the debts of a corporation, either to it or from it are totally extinguished."[3] In some of the earlier cases in this country these principles were recognized and applied; but not for long.[4] Sometimes criticised as resting only upon *dicta* and sometimes distinguished as applicable only to particular charters,—the doctrine has been utterly repudiated as to stock corporations; but as to others, it is not entirely obsolete. In the modern view, even where there is no statute so providing, a court of equity may and must take charge of the assets of a defunct share-corporation and, after the payment of its debts, make distribution of the remainder among the shareholders.[5] And even where the corporation has no capital stock, its property will, upon dissolution, belong to the members, unless it is impressed with some element of trust or special use.[6] In *Mormon Church v. United States,* 136 U. S. 1, Congress had repealed the charter and had, through the courts, seized for the benefit of local churches and

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[1] 1 Bl. Com. 484.

[2] 2 Kyd Corp. 516.

[3] 1 Bl. Com. 484.

[4] In *Agnew v. Bank,* 2 H. & G. 360 (1828), the question was left open.

[5] *Bacon v. Robertson,* 59 U. S 480,—in which there is a very learned review of the common law doctrine by Mr. Justice Campbell. See, also, *Greenwood v. R. R. Co.,* 105 U. S. 13.

[6] *Wilson v. Leary,* 120 N. C. 90; 5 Thomp. Corp. sec. 6746.

schools, the property of the Church of Latter-Day Saints,—a corporation of Utah,—then a territory and under the "general and plenary" power of the federal government: "The next question is whether Congress or the court had power to cause the property of the said corporation to be seized and taken possession of as was done in this case. When a business corporation instituted for the purpose of gain or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property like that of a man dying without heirs, ceases to be the subject of private ownership and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject as we shall hereafter see, to the charitable use. To this rule the corporation in question was undoubtedly subject. But the grantor of all or the principal part of the real estate of the Church * * * was really the United States. * * * Where a charitable corporation is dissolved and no private donor or founder appears to be entitled to its real estate (its personal property not being subject to such reclamation), the government or sovereign authority, as the chief and common guardian of the state, either through its judicial tribunals or otherwise, necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted, so far as they are lawful and not repugnant to public policy." In *Titcomb v. Insurance Company,*

79 Me. 315, the court went further in applying the old doctrine. The appellee was a mutual insurance company which went into voluntary dissolution in 1884, having no outstanding policies: "The only question is to determine what shall be done with the assets of the company. Our statutes contain ample provisions for the disposition of the assets of stock companies. * * * But this is a mutual company and has no stockholders and the provisions cited do not apply. 'According to the old settled law of the land,' says Chancellor Kent, 'upon the civil death of a corporation when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the People.' * * * But it is said that in this class of cases the corporators named in the Act of Incorporation should be regarded as stockholders. They are not stockholders, and to hold that they are would be a fiction, and fictions are not favored, and are never resorted to except to work out some strong and inherent equity, and there is no such equity in favor of the corporators of a mutual insurance company. They contribute nothing toward its assets and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses. * * * We think there is a much stronger equity in favor of the former policy-holders whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired and their premium notes have been cancelled or given up to them. * * * When a man dies leaving no wife or kindred, his property descends to the state. And when a corporation which, like a mutual insurance company, has no stockholders, ceases to exist, we

are not prepared to say that the rule of the common law, which gives its surplus assets to the state, is not a wise one."

Third. **Suits.** Statutes usually provide for the saving, notwithstanding dissolution, of existing rights of action and pending suits; but where no such statute exists the law is clear. A dead corporation, like a dead man, cannot be sued; the death of either will abate a pending action;[1] and a judgment recovered therein will constitute, as such, no valid claim against the estate of the corporation in the hands of its receivers.[2]

§ 161. **Forfeiture.** For non-use or abuse of the franchise, the state has a clear right by judicial proceedings, upon proof and after a hearing, to a judgment of ouster. This right is not affected by the fact that the corporation has an irrepealable charter; and forfeiture must be distinguished from certain other cognate ideas. Forfeiture proceedings assume the legal existence of the corporation. An association which never had a valid charter or whose charter has expired, may be acting in a corporate capacity; and in such a case, the question: by what warrant it presumes so

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[1] The rule in the text is logically applicable to suits by a corporation,—but there is authority for the proposition that dissolution pending such suit does not abate it. See 2 Clark & Marshall, Corp. sec. 329; and compare *Boyd v. Hankinson*, 92 Fed. 49,—as to which,—*query*. In *Agnew v. Bank*, 2 H. & G. 360, it was held that the expiration of the plaintiff's charter after suit brought was not a defense that could be raised under the general issue plea already pleaded.

[2] *Mumma v. Potomac Co.*, 8 Pet. 281; *Ordway v. Central National Bank*, 47 Md. 238; *Pendleton v. Russell*, 144 U. S. 640,—an instructive case. Of course, claims constituting causes of action may be proven against the estate of the corporation in the court administering its affairs. For the right to damages on an executory contract, see 2 Clark & Marshall, Corp. page 926.

to act, may be raised by the state and the usurpation enjoined, by an information in the nature of a *quo warranto*—*Regents v. Williams,* 9 G. & J. 232. Again it must be remembered that the mere existence of a cause of forfeiture does not, of itself, terminate corporate existence. The franchise may be abandoned, the property of the corporation may be taken from it by creditors or receivers,—but the corporate existence is not thereby destroyed.[1] Again, forfeiture proceedings are always and only taken by the state in the exercise of its prerogative, while those for a dissolution, whether voluntary or involuntary, may be instituted by private persons, and the court's jurisdiction is measured by the statute conferring it. In the light of these general principles, it remains to consider the law of Maryland.

First. **Procedure.** Under the Act of 1908, ch. 240, (Code 1911, Art. 23, secs. 82-86), the Attorney-General or the State's Attorney for the city of Baltimore or for any county may, when authorized by the Governor, file against the offending corporation a petition in the name of the State, setting forth the cause of forfeiture. This petition must be filed in the Circuit Court for the county or in the Superior Court of Baltimore City, according to where the principal office of the corporation is located. Provision is made for the manner and the time of filing the pleadings necessary to produce an issue; either party is entitled to a jury trial; and even where a cause of forfeiture has been shown, the court may, before passing a final judgment, give the corporation time within which to remedy the grievance. Either party may appeal within thirty days from the date of the

[1] Nor is a cause of forfeiture the subject of collateral attack. *Canal Co. v. R. R. Co.,* 4 G. & J. 1; *Murphy v. Wheatley,* 102 Md. 501.

court's final determination, and, under the provisions of the Code, Art. 5, sec. 69, the penalty of the bond to be given by the corporation, in order to stay enforcement, must not exceed ten thousand dollars.

Second. **Consequences.** When a judgment of forfeiture has been entered, it is provided that the charter of the corporation shall thereby be annulled and vacated; and it shall be ousted of its corporate franchises; and the court shall thereupon appoint a receiver or receivers of the corporate estate and assets; and the powers of such receivers and all the consequences of dissolution shall be such as are provided in the case of the dissolution presently discussed.

§ 162. **Voluntary dissolution.** It is a debated question whether, in the absence of statute, the majority of the shareholders or members have, against the protest of the minority, the right to wind up the corporation and surrender its charter; and, in the prevailing view, the answer depends upon the solvency or insolvency of the corporation. The subject is generally, however, covered by statute; and in Maryland, by secs. 76-81 of Code (1911), Art. 23:

76. Every corporation of this State other than a public service corporation, may by the affirmative vote of a majority of all of its members or of a majority of all its stock (or if two or more classes of stock have been issued, of a majority of each class) outstanding and entitled to vote, close its affairs and authorize a bill for its dissolution to be filed in the manner hereinafter set forth. The meeting for such purpose shall be duly warned according to the provisions of sections 15 or 16 of this Article [relating to extraordinary meetings]; and if at such meeting the said majority shall so decide, a petition for dissolution shall be forthwith filed in the name of the corporation, and on its

behalf, in a court of equity of the county or city in which its principal office is located.

77. Every such petition shall contain a statement of the reasons why the dissolution of the corporation is sought, and there shall be filed as an exhibit with it: a full and true inventory of its assets and liabilities; a list of all the stockholders, if any, their respective addresses, the number of shares belonging to each and the amount, if any, remaining due thereon; a full statement of all the incumbrances on the property of the corporation, and a full list of its creditors, with their respective addresses and the amounts due each. Such exhibit shall be verified by the oath or affirmation of some officer or stockholder of the corporation, and upon the filing of such petition accompanied by the exhibit, the court shall pass an order requiring all persons interested in the corporation to show cause by a day to be named, if any they have, why it should not be dissolved on another day to be named in said order, which said order shall be published, for such time as the court shall direct, in some newspaper published in the county or city in which such court is held; if an answer shall be filed to such petition, evidence shall be taken in the manner usual in courts of equity; if no answer is filed, or if upon consideration of the petition, answer and proof, the court shall be of opinion that no sufficient cause against a dissolution has been shown, a decree shall be entered dissolving the said corporation and appointing one or more receivers of its estate and effects, if any; and any of the directors or other officers or any of the stockholders or members of the corporation may be appointed its receivers or such other person or persons as the court may select.

79. Whenever any corporation shall be dissolved by the

decree of any court of this state, its property shall vest in its receivers appointed and named therein,[1] and all preferences, payments and transfers, howsoever made by it or by any of its officers on its behalf, which would be void or fraudulent under the provisions of the insolvency laws of this State, if made by a natural person, shall to the like extent and with like remedies be fraudulent and void;[2] and for the purpose of setting aside such preferences, payments and transfers, the receiver of such corporation shall have all the powers vested in the permanent trustee of an insolvent debtor and the date of the filing of the petition or bill by or against such corporation shall, for the purpose of determining the validity of preferences and for all other purposes, be treated as the date of the filing of the petition in insolvency by or against a natural person; provided, however, that if any real or personal property of such corporation shall have been decreed to be sold by any court of equity for the enforcement of a mortgage, deed of trust or deed of trust in the nature of a mortgage; or if there be a power of sale or a consent to a decree for a sale contained in any mortgage, deed of trust or deed of trust in the nature of a mortgage of real or personal property made by such corporation, then (unless with the written consent of the other parties in interest) the receiver of such corporation shall be authorized to sell only the equity of redemption in

[1] In *Prentiss Co. v. Whitman Co.*, 88 Md. 243, an execution was in the hands of the sheriff before the receiver was appointed, and the levy was made after appointment and qualification, but before the receiver took possession,—held, good.

[2] The suspension by the National Bankruptcy Act of the State insolvent laws, does not affect this provision. See *Clark Co. v. Colton*, 91 Md. 229. The trustee in bankruptcy has similar powers, but the federal courts cannot, of course, dissolve a state corporation.

the property mentioned in such decree, mortgage, deed of trust or deed of trust in the nature of a mortgage; and, unless such consent be given such decree and the powers of sale contained in such mortgage, deed of trust or deed of trust in the nature of a mortgage may be executed as if proceedings against the corporation had not been instituted.

81. The dissolution of a corporation shall not relieve its stockholders or directors or other officers from any obligations and liabilities imposed on them by law; nor shall it abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such change of parties, if any, as the court in which the same are pending shall direct. No receiver shall institute suit except by order of the court appointing him; and such suit may be brought in his own name as receiver or (notwithstanding its dissolution) in the name of the corporation, to his use.[1]

§ 163. **Involuntary dissolution.** In the absence of statute, a creditor, while he may ask a court of equity to take charge of and distribute among creditors, the assets of an insolvent corporation,—has no right to a dissolution. Again, as long as the majority, acting in good faith, are in favor of going on, the minority shareholders are without remedy, although bankruptcy may be the probable consequence of continuing.[2] Usually, however, insolvency is

[1] The dissolution of a corporation matures its obligations,—*Union Trust Co. v. Belvedere Hotel Co.*, 105 Md. 508; *U. S. v. Poe*, 120 Md. 94. Receivers appointed upon a dissolution of a corporation are sometimes called statutory receivers and their powers are greater than those of the ordinary receiver of a court of chancery, who is merely a conservator of assets. See *Gaither v. Stockbridge*, 67 Md. 224; *Prentiss Company v. Whitman Company*, 88 Md. 243; *Clark Company v. Colton*, 91 Md. 202; *Knabe v. Johnson*, 107 Md. 620, and see *Hughes v. Hall*, 117 Md. 547.

[2] *Howeth v. Coulbourne*, 115 Md. 117.

made by statute a ground for involuntary dissolution, and this is the case in Maryland. By the general incorporation law of 1868, as amended by the Act of 1894, Chapter 263, it was provided as follows:

"Whenever any corporation in this State shall have been determined by legal proceedings to be insolvent, or shall be proven to be insolvent by proof offered under any bill filed under the provisions of this section, it shall be deemed to have surrendered its corporate rights, privileges and franchises, and may be adjudged to be dissolved after the hearing, according to the practice of courts of equity in this State, upon a bill filed for that purpose in the Circuit Court of Baltimore city or in the Circuit Court No. 2 of Baltimore city, if the principal office of the corporation is located therein, or in the Circuit Court for any county, if the principal office or place of business of said corporation be therein located, or if the certificate of its incorporation be recorded therein; and such bill may be filed by any stockholder, shareholder or creditor of said corporation, or by the attorney-general of the State of Maryland, or by the State's attorney of the city or county in which the principal office of said corporation is located. But this section shall not apply to any railroad company chartered by this State."

The *present law* is the Act of 1908, ch. 240, Code (1911), Art. 23, sec. 78:

"Whenever any corporation of this State, other than a railroad, shall have been determined by legal proceedings to be insolvent or shall be proven to be insolvent by proof offered under any bill filed under the provisions of this section, it may be dissolved, after a hearing according to the practice of courts of equity in this State, upon a bill for that purpose filed in a court of equity of the county or city in which its principal office is located. Such bill may be

filed by any stockholder or creditor of the corporation."

The term, "insolvent," as used in this provision, means the inability of the corporation to pay its debts as they mature, in the ordinary course of business.[1] The consequences of dissolution and the powers of the receivers thereupon appointed, are as in the case of voluntary dissolution, above discussed.[2]

§ 164. **Winding up of insurance companies.** By Code (1911), Art. 23, sec. 178, the state insurance commissioner is vested with the power to institute "necessary proceedings under the laws of this State to close the affairs of any insurance company of this State which shall appear to him, upon examination, to be insolvent or to be fraudulently conducted"; and such proceedings are to be instituted "either by the attorney general or such other attorney as the attorney general may select." It is further provided that "the insurance commissioner is a necessary party to any proceedings for the purpose of closing up the affairs of any insurance company, when the same shall not be in the name of the State of Maryland."[3]

§ 165. **Dissolution otherwise than by judicial proceedings.** The Act of 1908, ch. 240, Code (1911), Art. 23, sec. 80, reproduces the following provision which originally appeared in the general incorporation law of 1868:

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[1] *Howeth v. Coulbourne,* 115 Md. 115.

[2] In *Davis v. Gemmell,* 73 Md. 536, it is said to be "perfectly clear that the Circuit Court of Baltimore City had no authority to wind up and dissolve the North Branch Company. That company was located in Garrett County and was not within the jurisdiction of the Court,—which was asked by the amended bill to declare its dissolution."

[3] As to state banks and trust companies, see Code (1911), Art. 11, and Act of 1912, ch. 194.

"Upon the dissolution of any corporation of this State in any manner otherwise than by judicial proceedings, and until other persons shall be appointed as receivers by some court of competent jurisdiction, the directors at the time of dissolution shall become and be trustees for the creditors, stockholders and members of the corporation so dissolved. They shall take title to its assets, real and personal, and shall have full power to wind up and settle its affairs, to use[1] for and collect its assets and to pay its debts; and they shall divide among the stockholders or members, the money and other property that shall remain after the payment of the debts and necessary expenses; and the said trustees shall be jointly and severally liable to the creditors, stockholders and members of such corporation to the extent of its property and effects that shall come into their hands."

§ 166. **Chancery receivers.** A court of equity has, of course, the inherent power to appoint for the benefit of the parties interested, a receiver for property in danger of loss or waste; and it makes no difference whether such property belongs to a natural person or to a fictitious person,—except that in the latter case, mere insolvency is sufficient to justify the intervention of the court.[2] Such a receiver is a mere custodian, vested with no title and having no powers of action or disposition other than those given by

[1] Error for "sue."

[2] The power to appoint a receiver for a solvent corporation is a discretionary one, to be exercised with great circumspection, and only in cases where there is fraud or spoliation, or imminent danger of the loss of the property if immediate possession is not taken by the court; and the existence of these conditions must be clearly proved. Internal dissensions among the stockholders, or differences or disputes as to the corporate management, will not warrant interference with the acts of the majority by the appointment of a receiver. *Howeth v. Coulbourne*, 115 Md. 121.

the court appointing him. His appointment does not work a dissolution of the corporation, nor can the court vest him with greater rights than the corporation itself could exercise.[1] Whatever would estop it, estops him. This is not the case, as has been shown, with statutory receivers appointed in forfeiture or dissolution proceedings.[2]

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[1] In the case of a public service corporation, the court may authorize the receiver to borrow money and issue certificates which will displace existing liens. This is a power sparingly exercised and not unless the corporation is engaged in the public service.—*Hooper v. Central Trust Co.*, 81 Md. 591, 29 L. R. A. 262.

[2] Compare *Hughes v. Hall*, 117 Md. 547.

CHAPTER XXIII.

FOREIGN AND FEDERAL CORPORATIONS.

§ 167. **Preface.** The modern and comparatively complex relation between one state and the corporations of another, has its origin in several sources: (1) Theoretically, the courts still recognize the doctrine of *Bank of Augusta v. Earle,* 13 Pet. 519 (1839): "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation. * * * But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. * * * Now, natural persons through the intervention of agents are continually making contracts in countries in which they do not reside. * * * And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside provided such contracts are permitted to be made by them by the laws of the place? * * * Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract

without their sanction express or implied."[1] (2) Unless and until forbidden, a foreign corporation may do business outside of its domicil, and, having entered another state, it is there a person within the Fourteenth Amendment and entitled to the guaranties thereof. (3) If the corporation is national by creation or adoption, or is engaged in interstate commerce, no state may exclude it or so impose conditions as to interfere with its federal or interstate business. (4) While not a citizen entitled to "all privileges and immunities of citizens in the several States"—under the Fourth Article, a corporation is nevertheless within the jurisdiction conferred upon the federal courts in cases of diverse citizenship; and it is conclusively presumed to be, for this purpose, a citizen of the creating state. The questions of law and procedure, state and federal, raised by the interaction of these principles are not settled; the field of discussion is a large one; and nothing more than a bird's eye view will be attempted here.

§ 168. **What corporations are foreign.** The general rule is that corporations not created by the laws of a particular state, are foreign to it;[2] but in the case of those

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[1] Per Taney, C. J. The question was whether the appellant, a corporation of Georgia, could sue on a note bought by its agent in Alabama. The reversed opinion of the lower court was that: "A bank incorporated by the laws of Georgia with the power among other things to purchase bills of exchange, could not lawfully exercise that power in the State of Alabama; and that the contract for this bill was therefore void and did not bind the parties to the payment of the money."

[2] The Act of 1908 (Code 1911, Art. 23, sec. 90), provides that "The term, foreign corporation, as used in this article, shall mean every corporation, association or organization, other than a national bank, which has been established, organized or chartered under laws other than those of this State."

created by Congress there is a diversity. Where the corporation is national in its nature, that is to say, created by Congress acting as the legislature of the nation, it is said to be domestic in each state where the franchise is exercised. Thus, in *Pennsylvania v. Texas & Pacific R. R. Co.*, 98 Pa. St. 90, it was held that the term "foreign corporation" in a revenue law had no application to the appellee,—created by Act of Congress. On the other hand, where Congress, acting as the legislature of the District of Columbia and the territories, authorizes the formation of corporations, these are foreign to the several states.

§ 169. **Repeal and amendment.** Obviously a state cannot repeal or amend a charter which it did not grant; moreover, it will not, by its courts, attempt to regulate the internal management of a foreign corporation, doing business within its borders.[1] The practical questions that arise, therefore, are those which touch the power of the state to impose conditions upon the right of foreign corporations to enter and do business within its limits; to regulate their

[1] *Condon v. Reserve Asso.*, 89 Md. 99, 44 L. R. A. 149; *North State Copper Co. v. Field*, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253. A state may, however, provide that a foreign corporation shall not dispose of its land situated therein except by the vote of the stockholders,—the theory being that such a requirement is not a regulation of the internal affairs of the corporation, but has reference to the conduct of business. *Williams v. Gaylord*, 186 U. S. 157. A resident stockholder in a foreign corporation may sue its officer and agent, also a resident, to compel an accounting to the corporation. *Sloan v. Clarkson*, 105 Md. 171; and an inspection of the books of a foreign corporation, kept within the local jurisdiction, may be enforced by mandamus. *Machen v. Mayer Elec. Co.*, 85 Atl. 100 (Pa.). Much is to be said for the tendency of these recent cases,—especially where the corporation is a local enterprise with a foreign charter.

intercourse with its citizens; and to collect from them revenue and taxes.

§ 170. **Exclusion.** Where the foreign corporation is not an instrumentality of the federal government or of interstate commerce, the right of exclusion is absolute. In the leading case of *Paul v. Virginia,* 8 Wall. 168, a statute of the appellee discriminated between domestic and foreign insurance companies. The appellant was the agent of a New York company, and was indicted for doing business in Virginia without paying the tax imposed by the statute. The contentions were: (a) That being a citizen of New York the corporation was therefore entitled in Virginia to all the privileges and immunities of citizens of that state; and (b) that the statute of Virginia was an interference with interstate commerce. The court held that the term "citizen," in the clause of the Constitution invoked, applies only to natural persons; and also that the business of insurance is not commerce. In *Hooper v. California,* 155 U. S. 648, a statute of the appellee made it a misdemeanor for any person in that state to procure insurance for a resident from a foreign company which had not qualified for doing business therein; and the appellant, an insurance broker, had violated the statute. The court said: "The principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, has long been settled and many phases of its application have been illustrated by the decisions of this court. * * * Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business. As, for instance, where it has derived its being from an Act of Congress, and has become a lawful agency for the perform-

ance of governmental or *quasi*-governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority. * * * The contention here is that, inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority and included among the exceptions to the general rule. * * * The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea. The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. * * * One more contention remains to be noticed. It is said that the right of a citizen to contract for insurance

for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear *non sequitur* and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction."[1]

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[1] Accordingly, in *Allgeyer v. Louisiana,* 165 U S. 578, where the appellant had been fined under a statute of the appellee, which in effect "prevented an owner of cotton in that State from sending to an insurance company of another state not authorized to do business in Louisiana, an order by mail for insurance on the cotton to be shipped to a foreign port, in pursuance of a valid contract for such insurance previously made and to be performed in the other state," —the statute was held to be a violation of the Fourteenth Amendment, in that it deprived the appellant of his liberty without due process of law. "The liberty mentioned in that amendment means not only the right of the citizen to be free from mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Compare with the cases in the text, *International Text Book Co. v. Pigg,* 217 U. S. 91,—holding that the business of a correspondence school is interstate commerce.

§ 171. **Conditions.** It being lawful, then, for a state, within the constitutional limits mentioned, to prescribe the conditions upon which a foreign corporation may enter and do business therein,—such conditions have been very generally enacted; and a large volume of litigation has arisen over them. It is usually required that, as a condition precedent, the foreign corporation must file with some state officer a copy of its charter and a statement, to be renewed periodically, of its financial condition; appoint a resident agent upon whom process may be served; and pay prescribed entrance fees and periodical franchise taxes. The penalties for non-observance are various. Usually, fines are imposed upon the agents of the offending corporation, but the chief difficulty arises when it sues, in the courts of the state, on contracts made in disregard of a statute conditioning the right to "do business" within the state. What constitutes "doing business"; where was the contract made; what conditions upon the right to do business amount to a regulation of interstate commerce or are otherwise void? The way in which these and similar questions are answered by the courts will be considered; but first, the statutory provisions in Maryland will be stated.

Maryland statutes. The Act of 1908, ch. 240 (Code 1911, Art. 23), provides:

Sec. 93. Every foreign corporation which has a usual office or place of business in this state, except insurance companies hereinafter provided for, but including any corporation which is engaged in this state permanently or temporarily, and with or without a usual place of business therein, in the construction, alteration, erection or repair of any building, bridge, railroad, railway or structure of any kind, shall, before doing business herein, file with the secretary of state, who shall record the same, (1) a certified

copy of its charter or certificate of incorporation; (2) a certificate to be renewed annually before the first day of April in every year, subscribed and sworn to by its president or treasurer, or a majority of its board of directors and accompanied by the annual fee of one dollar for recording such renewal, showing (*a*) the corporate name; (*b*) the names and addresses of its president, treasurer, secretary and the members of its board of directors; (*c*) its principal office in this state and in the state of incorporation; (*d*) the amount of its capital stock authorized and issued, the number and par value of the shares and the amount paid in thereon, and the names and addresses of its shareholders in this state, and the number of shares held by each, and the amount of its capital employed in this state; (*e*) the name and address of its agent, resident in this state, and authorized to accept service of process upon it; and (*f*) its willingness that so long as any liability remains outstanding against it in this state, the authority of such agent shall continue until a substitute is appointed and certified to the secretary of state. At the time of filing the original papers required by this section every such foreign corporation shall pay to the secretary of state for the use of the state, a fee of twenty-five dollars, upon receipt of which he shall issue to it the certificate setting forth that it is entitled to do business in this state, and for all such fees said secretary of state shall account quarterly to the comptroller and pay the same forthwith to the state treasurer for the use of the state, less the costs and the expenses of recording the same.[1]

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[1] Special provisions are made by Article 23 for foreign insurance, surety, casualty, loan and trust companies. The filing provisions are unnecessarily cumulative and display no discernible sense. The

Sec. 94. Every officer of any such foreign corporation which fails to comply with the provisions of the preceding section, and every agent of such non-complying corporation, who transacts business for it in this state, shall be guilty of a misdemeanor and liable to a fine of two hundred dollars. Such failure shall not affect the validity of any contract made with such non-complying corporation, but no suit shall be maintained in any of the courts of this state by any such corporation until it has complied with the requirements of this article.[1]

Doing business. A mere isolated transaction is not within a prohibition against doing business, even if done within the state. In *Cooper Manf. Co. v. Ferguson,* 113 U. S. 727, for example, the appellant, a corporation of Ohio, having no place of business in Colorado, entered there into a contract with the appellee by which it sold to him certain machinery to be delivered on the cars in Ohio. The law of Colorado required foreign corporations to qualify before doing business therein; and in a suit on the contract, the appellee set up the statute. The court said: "If a contract on which the suit was brought was made in violation of a law of the

license provisions embody an unscientific compromise between the desire for revenue and the fear of retaliatory legislation against Maryland corporations doing business in other states. Article 81 (Revenue and Taxes), section 177, makes special provisions for foreign telephone, electric light, electric construction, parlor, palace or sleeping car, oil or pipe line, guano, phosphate or fertilizer companies.

[1] The provisions in this and the preceding section are void to the extent that they directly burden the right to do within the state, federal or "purely interstate business"; and impair the right to sue on contracts made in the course of such business. *Buck Stove Co. v. Vickers,* 226 U. S. 205; *International Text Book Co. v. Pigg,* 217 U. S. 91.

state, it cannot be enforced by any court sitting in the state, charged with the interpretation and enforcement of its law. * * * * But the making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery, and the other party to pay for it, did not constitute a carrying on of business in Colorado." On the other hand, in *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, a corporation of Illinois sued in Wisconsin a corporation of that state upon an agreement whereby the plaintiff was to supervise the erection, operation and disposition of the output, of a glue factory, to be built by the defendant in Wisconsin. The defendant set up a Wisconsin statute requiring foreign corporations to file a copy of their charter with the secretary of state and to pay a small fee, as a condition of doing business therein. The penalty prescribed for non-compliance was a fine, and that contracts made before compliance should be wholly void on behalf of the corporation, but enforceable against it. The court held: (1) that the transaction constituted "doing business" by the Illinois corporation in Wisconsin; and (2) that it was not saved by the fact that it was remotely connected with interstate commerce.[1]

The place of making the contract. Where the foreign corporation has not qualified, the question whether a particular transaction amounts to doing business in the state may depend upon where the contract is made. In *Holder v. Aultman Co.*, 169 U. S. 81, a statute of Michigan made void

[1] See further, *Chattanooga Building Asso. v. Denson*, 189 U. S. 408; *Allen v. Alleghany Company*, 196 U. S. 458. Unless compelled by the plain language of a constitutional statute, the courts will not declare the contract void. *Kendrick v. Warren Bros. Co.*, 110 Md. 47,—holding that compliance after suit brought was sufficient.

all contracts entered into in that state by a foreign corporation which had not filed its articles of association and paid a franchise tax. The appellant was a citizen of that state and the appellee a corporation of Ohio; and the parties signed in Michigan a contract for the sale of agricultural machines,—which provided that it should not be valid until approved at the principal office of the corporation in Ohio. In a suit brought against him in the United States court for Michigan, the appellant relied on the statute and the appellee contended: (1) that it did not apply, because the subject-matter of the contract was interstate commerce; and (2) that the contract was made in Ohio and not in Michigan. The court sustained the latter contention, and said that it was not necessary to pass upon the constitutional question raised. In *Stevens v. Raisin Fertilizer Co.*, 87 Md. 679,[1] the appellant was receiver of a mutual fire insurance company of Massachusetts, which had issued a policy to the appellee, a body corporate of Maryland, on its property therein. The Massachusetts company had never qualified in Maryland, and the suit was brought by its receiver to recover assessments due under the policy. The insurance was effected in this way: The appellee applied to its broker in Baltimore, and he communicated with brokers in New York; these in turn corresponded with the corporation in Massachusetts. The policies were signed in Boston, forwarded to the New York brokers, and by them sent to the broker in Baltimore. He delivered them to the appellee, collected the premiums, deducted his commissions, and remitted the balance to the brokers in New York, by whom it

[1] The Act of 1908, quoted at the beginning of this section, excepts insurance companies, as to which see Code (1911), Art. 23, e. g. sec. 159; and compare *Kendrick v. Warren Bros. Co.*, 110 Md. 47.

was paid to the company in Massachusetts. The court held that this transaction was consummated by the payment of the premiums; and that, "as the risks were taken in Baltimore," there could be no recovery. In *Swing v. Munson*, 191 Pa. St. 582, a statute of Pennsylvania made it unlawful for any one to solicit or effect insurance within the state, or to receive or transmit any offer of insurance, or to receive or deliver any policy, without complying with the provisions of the statute. The appellant was the receiver of a mutual insurance company of Ohio and the appellee was a citizen of Pennsylvania to whom it had issued a policy on property located in that state. It was conceded by the court, for the purpose of the decision, that the contract was made in Ohio, but the test was said to be: not the place where the contract was made, but the place where the subject-matter of it was located—and recovery was denied.

Whether the contract is void or merely unenforceable. As has been seen, the answer to this question depends, primarily upon the wording of the particular statute,—but there is a great diversity in the cases construing statutes that are substantially similar. It is sometimes held that the imposition of a penalty negatives any intent to make void the transaction, unless this result is expressly declared; and that mere prohibition, without penalty, simply subjects the corporation to ouster from the state. Again, it is held that unless contracts made in violation of the statute are expressly declared to be void, the remedy on them is merely suspended; and that subsequent qualification will restore the right to sue.[1] Another view seems to be that a forbidden

[1] *Contra*: *Pittsburg Construction Co. v. West Side R. Co.*, (C. C. A.) 154 Fed. 929; with which compare *West Side R. Co. v. Pittsburg Construction Co.*, 219 U. S. 92,—on writ of error to the state court.

transaction is unlawful, that is to say, so far void that the courts of the state will refuse to aid the offending corporation; and will refuse, also, to aid the other party,—unless so doing would make the statute operate against the persons it was intended to protect,—as for example, one who deals with a foreign corporation having a place of business in the state, in ignorance of the fact that it has not complied with the law. In this view, there is nothing to prevent a recovery on such contracts anywhere except in the courts applying the law of the state whose statute has been violated.[1]

§ 172. **Illegal regulations.** In *Orient Insurance Co. v. Daggs,* 172 U. S. 557, the rule is broadly stated: "That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state." Of course the right to repeal, amend or forfeit the charter of a corporation is confined to the creating state; but the case is a good illustration of the general rule. The appellant was a corporation of Connecticut, and the appellee was a citizen of Missouri who had taken out, in that state, insurance on his property situated there. The policy provided that the company should not be liable beyond the actual cash value of the property at the time the loss occurred, and that its liability should in no case exceed the cost of replacing the property, after deducting an allowance for depreciation. A statute of Missouri, passed before the policy was issued, provided that in all suits upon insurance policies thereafter brought, the defendant should not be permitted to deny that the property insured was worth the full amount for which it was insured. The court held that this was an obligation

[1] *Allen v. Alleghany Company,* 196 U. S. 458; *Kendrick v. Warren Bros. Co.,* 110 Md. 47. And see case note, 40 L. R. A. (N. S.) 857.

which the state could lawfully impose upon its own corporations and that the appellant was bound by it.[1]

It would seem logical to say that the right to exclude from the state includes the right to regulate a foreign corporation which has entered. But the principle is not so broad.

Constitutional guaranties. Being for the purposes of federal procedure a citizen of the creating state, a corporation sued in any other state has, where the jurisdictional amount is involved, the right of removal to the federal court. Accordingly, a statute which requires an agreement not to remove as a condition of admission, is, to that extent, unavailing. But, on the other hand, if the corporation is one which the state has the power to exclude, it may revoke a permission previously given; and the fact that such revocation is based upon the exercise of the right of removal makes no difference; where a right exists, the motive leading to its exercise is immaterial.[2] Again, in *Blake v. McClung*, 172 U. S. 239, a statute of Tennessee imposed upon certain classes of corporations the condition that their assets, in the event of insolvency, should be first applied to the claims of resident creditors. A corporation of the class designated by the statute became insolvent, and among its non-resident creditors were citizens of Ohio and a corporation of Virginia. The court held that as to the former, the condition was void, because it violated the clause of the Constitution giving to the citizens of each state all the privileges and immunities of the citizens of the several states. As against the Virginia

[1] So in *Dayton Coal & Iron Co. v. Barton*, 183 U. S. 23, the appellant was held bound by a state statute requiring the redemption of "store orders" in money,—the statute having been held valid as to domestic corporations.

[2] *Security Insurance Co. v. Prewitt*, 202 U. S. 246,—in which all the earlier cases are reviewed and one of them is qualified.

corporation, the statute was upheld on the ground: (1) that it was not a citizen within the meaning of the constitutional provision quoted; and (2) that although a "person" within the meaning of the Fourteenth Amendment, it was not doing business in Tennessee and therefore not within the language of the Amendment declaring "that no state shall deny to any person within its jurisdiction the equal protection of the laws."

Again, a foreign corporation, after lawful entry into a state, is a person entitled to the equal protection of the laws with domestic corporations. There is a conflict when this principle meets the right of exclusion established by *Prewitt's case* (*supra*); and the latter yields.[1]

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[1] *Western Union T. Co. v. Kansas,* 216 U. S. 1; *Southern R. Co. v. Greene,* 216 U. S. 400; *Herndon v. Chicago &c. R. Co.,* 218 U. S. 135; and see the earlier case of *American Smelting Co. v. Colorado,* 204 U. S. 103, in which a foreign corporation successfully asserted that the law in force at the time of its admission constituted a contract against higher taxation than was imposed upon domestic corporations of the same character. The statement in the text is made on the basis of Justice White's concurring opinion in *West. Union Co. v. Kansas, supra,* rather than on the difference between the business of insurance and interstate commerce emphasized in the opinion of the Court. See *Baltic Mining Co. v. Mass.,* 231 U. S. 68, in which a moderate excise tax measured by the authorized capital of a foreign corporation, was upheld.

§ 173. **Status when admitted.** A corporation lawfully doing business in another state is a "person within its jurisdiction" under the Fourteenth Amendment. It carries its charter with it,[1] and within the limitations of the charter, it has the rights and is subject to the restrictions of a domestic corporation of a similar character;[2] but, unless it be a national corporation,[3] it cannot exercise within the state any special privilege,—such as the right of eminent domain.[4] It is entitled to free access to the state courts, but may, like other non-residents, be required to give security for costs. It remains a non-resident, so far as the operation of local insolvency laws is concerned, and a debt due it by a resident debtor will not be discharged by insolvency proceedings in which it does not participate.[5]

It is provided by statute in Maryland that "No foreign corporation shall engage or continue in any kind of business in this state, the transaction of which by domestic

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[1] *Relfe v. Rundle*, 103 U. S. 222; *Canada R. R. v. Gebhard*, 109 U. S. 527.

[2] There is a difference of opinion as to the status of a corporation formed by the citizens of one state under the laws of another, for the purpose of doing business in the state of their residence. At one extreme are cases denying individual immunity from corporate debts to the persons operating under such charter.—*Duke v. Taylor*, 37 Fla. 64, 31 L. R. A. 484. The other and prevailing view is that such a proceeding is not necessarily a fraud upon the law of the non-creating state—*Demarest v. Flack*, 128 N. Y. 205; and see the cases collected in 13 Am. & Eng. Ency. of Law (2d Ed.) page 846.

[3] *Luxton v. North River Bridge Co.*, 153 U. S. 529.

[4] 3 Clark & Marshall, Corp. sec. 854.

[5] *Hammond Co. v. Best*, 91 Me. 431, 42 L. R. A. 528:—and for cases where the charter powers of a foreign corporation exceed those conferred upon domestic ones,—see 3 Clark & Marshall, Corp. secs. 840 and 841.

corporations is not permitted by the laws thereof. And every foreign corporation doing business in this state shall be deemed to have assented to all the provisions of the laws thereof."[1]

§ 174. **Suits and process.** We have seen that unless it lawfully may be, and in fact has been excluded, and subject, in every case, to the imposition of a rule security for costs,—a foreign corporation has the same right of resort to the state courts that a domestic corporation has, Where, however, the proposed suit is *against* a foreign corporation, important questions arise: Where may it be sued; and upon whom may process lawfully be served? It is important to remember that these questions are distinct. The court may have jurisdiction of the suit, but the writ of summons may be properly quashed because the person upon whom it was served did not sufficiently represent the corporation for that purpose. So, a plea to the jurisdiction may be available where no question could be made about the representative character of the agent served with process. With these distinctions in view, a summary will be given of the general doctrine; then, a brief account of the federal and Maryland law.

First. **General principles.** (1) A corporation which transacts no business in the state is not amenable to suit there. This is one of the surviving applications of the territorial theory promulgated in *Bank of Augusta v. Earle*.[2] The theory has no application to a non-resident

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[1] Act of 1908, Code 1911, Art. 23, sec. 91; *Patapsco Elec. Co. v. Baltimore*, 110 Md. 306; *Hannis Distilling Co. v. Baltimore*, 114 Md. 678.

[2] 13 Peters 519; and see *Conley v. Mathieson Alkali Works*, 190 U. S. 406.

natural person; nor does it apply to proceedings not *in personam*: for example, the property and credits of a non-resident corporation within a state are subject to foreign attachment just as those of a non-resident natural debtor would be. (2) Even where a foreign corporation is lawfully doing business within a state, the summons must be served upon some one having authority, express or implied, to represent it. (3) But where the state statute designates the classes of persons upon whom service may be made, the foreign corporation—whose right to do any business at all in the state depends upon its consent,—will, by the act of entering, be deemed to have assented to the conditions of the statute. But even here there is a limit. In *St. Clair v. Cox,* 106 U. S. 350, the question was as to the admissibility in evidence of a certified copy of a judgment obtained by the appellant, in a court of Michigan, against a corporation of Illinois; and the objection was based on the ground that by reason of insufficient service, the court had not obtained jurisdiction. The laws of Michigan provided for service upon any "officer, member, clerk or agent" of the foreign corporation within the state; and the court said: "These conditions must be deemed valid and effectual * * * provided they are not repugnant to * * * that principle of natural justice which forbids condemnation without opportunity for defense. * * * If a state permits a foreign corporation to do business within her limits and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive

service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. * * * Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is a mere stockholder—is not a departure from the principle of natural justice * * * which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service or in the pleadings or finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, * * * It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee or to a particular transaction or that his agency had ceased when the matter in suit arose." (4) Execution upon a judgment *in personam* against a foreign corporation, where service has not been made upon a representative agent, is a taking of property without due process of law.[1]

[1] *Scott v. McNeal,* 154 U. S. 46,—and for a distinction see *York v. Texas,* 137 U. S. 15. In *Conn. Ins. Co. v. Spratley,* 172 U. S., 602,

Second. **Federal law. Jurisdiction.** The Federal Judicial Code, Chapter 2, sec. 24, provides as follows: "The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any

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the appellant, after doing business in Tennessee, withdrew from the state and took no new risks therein; but it continued through an agent in another state, to collect premiums on its outstanding Tennessee policies. The appellee obtained judgment in a Tennessee court, by service on a regular adjuster of the company who had been sent from the home office, with authority to compromise the claim. The corporation filed its bill to have proceedings under the judgment enjoined on the ground that, if enforced, its property would be taken without due process of law. The Supreme Court of Tennessee dismissed the bill and the case was taken by writ of error to the Supreme Court of the United States, which held: (1) That notwithstanding it had ceased to take new risks, the company, by collecting premiums on the outstanding policies and paying losses thereunder, was still doing business within the state; and (2) that the adjuster sufficiently represented the corporation to make the service of summons on him binding upon it. The statute of Tennessee relating to foreign corporations provided: "That process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be." As to which the court said: "Holding the service of process upon this particular agent sufficient in this instance, and so far as the character of the agent is concerned, we do not, as we have already intimated, hold that service upon any agent mentioned in the act of 1887 would be good. That question is not before us."

A foreign corporation sued in a state court may, where the jurisdictional amount is involved, remove the case to the appropriate federal court, and there move to set aside a summons and service,—which would be valid under the state law—*Conley v. Mathieson Alkali Works*, 190 U. S. 406; but it cannot contend that the federal court has not the same right to pass upon the questions at issue that the state court would have had, if the cause had remained there—*De Lima v. Bidwell*, 182 U. S. 174.

officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." Chapter 4, sec. 51, provides: "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

These provisions, of course, apply equally to natural persons and corporations, but as applicable to the latter the following results are important: (1) A corporation of one state is, for the purpose of federal procedure, a citizen of that state,—although all of its shareholders reside in and all of its property may be situated in another.[1] Moreover, where interstate corporations are con-

[1] This is a legal fiction which has had an interesting history,—reviewed in *St. Louis R. R. v. James*, 161 U. S. 545.

solidated, or where a corporation of one state is given a charter by another,—the consolidated corporation remains, for the purposes of federal procedure, a citizen, by the new name, of the state of each constituent; and the re-created corporation remains a citizen of the state which first gave it birth.[1] (2) Where jurisdiction depends upon diverse citizenship, the court of the district in which either litigant resides, and no other, is available,—whether by original writ or by removal. *Ex parte Wisner,* 203 U. S. 449. The residence of a corporation is in the creating state; and the maintenance of a usual place of business elsewhere is not the equivalent of residence. *Re. Keasbey and Matteson Co.,* 160 U. S. 221. (3) The defendant, when sued in a district which is not the residence of either litigant, may waive his right,—*International Construction Co. v. Gibney,* 160 U. S. 217; and the restrictions of the statute have no reference to a defendant corporation created by a foreign government,—*Barrow Steamship Co. v. Kane,* 170 U. S. 100.[2]

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[1] This is believed to be the result of the decisions. See *Southern R. Co. v. Allison,* 190 U. S. 326; *Louisville R. R. v. Louisville Trust Co.,* 174 U. S. 552; *St. Louis R. R. v. James,* 161 U. S. 545; *Nashua R. R. v. Boston R. R.,* 136 U. S. 356; *State v. Northern Central Ry.,* 18 Md. 193.

[2] For a full review of the earlier decisions see *Conley v. Mathieson Alkali Works,* 190 U. S. 406; *Chicago Board of Trade v. Hammond Co.,* 198 U. S. 424; *Kendall v. Automatic Loom Co.,* 198 U. S. 477. The officer or agent of a foreign corporation does not merely by coming into the state of the plaintiff's residence, bring his corporation with him. It is necessary that the corporation should, *in some degree,* be doing business in the plaintiff's state; but the limits of "some degree" are not easy to define. See *Hunter v. Mutual Reserve Co.,* 218 U. S. 573; *Noel Construction Co. v. Smith Co.,* 193 Fed. 492; and even where the corporation is doing business

Third. **Federal Law. Process.** Where suit is brought against a foreign corporation in the district of the plaintiff's residence, the court will follow the state statute providing how and upon whom process may be served,—provided always, that the corporation is doing business within the state, and that the provisions of the statute are reasonable, within the narrower view of the federal decisions.[1] But the court will not refuse to take cognizance of the case simply because the statute does not give the state court the right to do so. In *Barrow Steamship Co. v. Kane,* 170 U. S. 100, the appellee was a resident of New Jersey and the appellant was an English corporation running a line of steamships from Londonderry to New York. Suit was brought in the circuit court of the United States for the southern district of New York, for an assault upon the appellee by the appellant's agents in the port of Londonderry. The appellant regularly did business in New York through a mercantile firm, its regularly appointed agents, and upon them the writ of summons was served. It was contended that "The statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident and for a cause not arising within the State, and therefore that the circuit court acquired no jurisdiction of this action brought against a British corporation, by a citizen and a resident of New Jersey." The court, in an able and instructive review of the preceding cases, sustained the action, saying: "The manifest injustice which would

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within the state, the agent upon whom process is served must fairly represent the corporation in respect to such business. *Peterson v. Chicago &c. R. Co.,* 205 U. S. 364.

[1] *Boggs v. Mining Co.,* 105 Md. 371.

ensue if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced many states to provide by statute that a foreign corporation making contracts within the state shall appoint an agent residing therein upon whom process may be served in actions upon such contracts. This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States held within the state; but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States. * * * The present action was brought by a citizen and resident of the State of New Jersey, in a circuit court of the United States held within the State of New York, against a foreign corporation doing business in the latter State. It was for a personal tort committed abroad, such as would have been actionable if committed in the State of New York or elsewhere in this country, and an action for which might be maintained in any circuit court of the United States, which acquired jurisdiction of the defendant. * * * The summons was duly served upon the regularly appointed agents of the corporation in New York. The action was within the general jurisdiction conferred by Congress upon the circuit courts of the United States. The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states, cannot deprive such citizens of

their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States."

Fourth. **Maryland law. Jurisdiction.** Prior to the legislation of 1908, Chapter 240, the liability of a foreign corporation to suit in the state was determined by the following rules: (1) If at the time of suit brought the corporation was doing business here, a resident of Maryland could sue on any cause of action; a non-resident only if the cause of action arose, or the subject matter was situated here. (2) If the foreign corporation had left the state after incurring a liability, it was still amenable to suit here by a resident.[1] (3) Subject to rule (2), a foreign corporation not doing business here could not be sued, without its assent,[2] in the courts of this state, by any plaintiff, resident or non-resident.[3] (4) The limitation of rule (3), by express statutory provision, did not apply to cases of non-resident attachment; but, following the principle that a creditor's right to attach depends upon the right of the debtor to sue the garnishee,—it was held that the creditor, resident or non-resident, of a non-resident debtor could not garnish a foreign corporation, doing business in Maryland, unless the cause of action arose, or the subject matter of the suit was situated here.[4] The

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[1] *Boggs v. Mining Co.*, 105 Md. 371.

[2] *Fairfax v. Chambers*, 75 Md. 604.

[3] *Crook v. Girard Iron Co.*, 87 Md. 138.

[4] *Myer v. Insurance Co.*, 40 Md. 595; *Cromwell v. Insurance Co.*, 49 Md. 366. But the property and credits of a foreign corporation (debtor), held by a domestic corporation, can be attached whether the plaintiff (creditor) be a resident or non-resident of the state. *Mason v. Union Mills Co.*, 81 Md. 446; *Linville v. Hadden*, 88 Md. 594; *Hodgson v. Southern Building Asso.*, 91 Md. 439.

Act of 1908, Chapter 240 (Code 1911, Art. 23, sec. 92) changed the former law by putting an end to the distinction between resident and non-resident plaintiffs, in cases where a foreign corporation is doing business in this state; consequently it may be sued, in such cases, on any cause of action by any plaintiff, resident or non-resident, and the limitations of rule (4) *supra,* in attachment cases, no longer apply. The statutory provisions are:

"Any person or corporation, whether a resident or non-resident of this state, may sue any foreign corporation regularly doing business or regularly exercising any of its franchises herein for any cause of action. Such suit may be brought in any county or in the city of Baltimore, as the case may be, where its principal office in this state, named in the certificate provided for by the next succeeding section of this article, is located or where it regularly transacts business or exercises its franchises, or in a local action, where the subject matter thereof lies; and a corporation acting as surety may be sued wherever a similar corporation of this state could be sued under the provisions of section 87 of this article. * * * If any corporation shall, after incurring liability in this state or after making any contract with a resident thereof, cease to do business or to have such resident agent, or a president, director, manager or other officer herein, then and in such case suit may be brought in the county or city in which the plaintiff resides. * * * Nothing herein shall prevent or affect the issue of attachments against foreign corporations as now or hereafter allowed by law."[1]

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[1] Chapter 309, also passed at the session of 1908, and not a part of the revised corporation law (Chapter 240), reads as follows:

"Any corporation not chartered by the laws of this state, which

Fifth. **Maryland law. Process.** For foreign corporations generally, it is provided by the Act of 1908, Chapter 240 (Code 1911, Art 23, sec. 92):

"Process may be directed to the sheriff, constable or other proper officer of any county or of the city of Baltimore, returnable to the clerk of the court out of which, or to the justice of the peace by which, the same was issued, and may be served as follows: If such corporation has a resident agent authorized and prepared to accept service as provided by section 68 of this Article, such process shall be served upon him. If the corporation has no resident agent so authorized and prepared, process may be served (subject to the special provision for insurance companies and fraternal beneficiary societies, orders or associations hereinafter mentioned) upon any president, manager, director, ticket agent or officer of the corporation, or upon any agent or other person in its service. In all cases, however, a copy of the process shall be left with the person upon whom it is served; and where process is served upon any person other than the resident agent, president, director or other officer of the corporation, a copy of the process shall also be left at its principal office in this State, if there be one named as aforesaid. If any foreign corporation shall, after incurring liability in this State, or after making any contract with a resident thereof, cease to do business or to have such resident agent or a

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shall transact business therein, shall be deemed to hold and exercise franchises within this state, and shall be liable to suit in any of the courts of this state on any dealings or transactions therein, and also shall be liable to suit in any of the courts of this state on any controversy which may arise between such corporation and any resident of this state." For which, see *Hagerstown Brewing Co. v. Gates,* 117 Md. 348.

president, director, manager or other officer herein, then and in such case * * * process may be served upon any person in this State who was last a resident agent, president, director, manager or other officer of such corporation in this State; provided, however, that a copy of such process shall also be served on the president or some director of such foreign corporation wherever he may be found, and an affidavit of such service may be made by the person serving the same (whether he be a resident or a non-resident of this State) before any officer authorized by the laws of this State to take the acknowledgment of deeds to be recorded therein. And the affidavit showing such service and the time thereof shall be returned to the court in which the suit against such foreign corporation is pending."[1]

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[1] The Act of 1908 (Code 1911, Art. 23, sec. 93) provides that in the certificate therein required from a foreign corporation, there shall be stated "the name and address of its agent resident in this state and authorized to accept service of process upon it; and its willingness that, so long as any liability remains outstanding against it in this state, the authority of such agent shall continue until a substitute is appointed and certified to the secretary of state."

Special provisions are made in other parts of Article 23 for e. g. insurance companies (sec. 182), beneficiary associations (sec. 231), and trust, surety and fidelity companies (sec. 379). Article 81 (Revenue and Taxes), sec. 177, contains special provisions for foreign telephone, electric light, electric construction, parlor, palace or sleeping car, oil or pipe line, guano, phosphate or fertilizer companies. The question in every case is, whether the foreign corporation has had actual or constructive notice of the suit against it. Where there has been a timely receipt of actual notice, it would be immaterial whether the officer, agent or employee, service upon whom is authorized by the state statute, is or is not a representative person. Where the liability of the foreign corporation depends upon constructive notice merely, the question is one of degree; and

§ 175. **Taxation.** Closely connected, but not identical, with the power to impose conditions upon foreign corporations, is the right to tax them when admitted. And here again the chief difficulty is in defining the line of conflict between the inherent right of a state to tax all persons and property within its borders, and the constitutional guaranty against taxation that is unequal; or which operates directly upon federal or interstate business. Taxing statutes directed against foreign corporations assume a variety of guises, and sometimes their validity depends upon rather fine distinctions. A brief reference mostly in repetition of what has been heretofore said will be made to a few of the main princpiles,[1] and then an account will be given of the statutory provisions in Maryland.

First. **General principles.** A state may not tax property beyond its borders; nor franchises granted by the United States; nor the privilege of engaging in interstate commerce; nor may it discriminate, for taxing purposes, between the property of a foreign corporation which has duly entered, and similar property of a domestic corporation of the same general character. But the tangible property of a foreign corporation in the state may be valued

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while it may be said that the foreign corporation has, by doing business in a state, assented to the provisions of its statutes, nevertheless, the federal rule, that the person served with process must in some fair sense represent the corporation, is the right one. See *Connecticut Insurance Co. v. Spratley,* 172 U. S. 602; *Conley v. Mathieson Alkali Works,* 190 U. S. 406; and see generally, *Boggs v. Mining Co.,* 105 Md. 371; *Central of Georgia R. Co. v. Eichberg,* 107 Md. 363; *Smith Premier T. Co. v. Westcott,* 112 Md. 150. Typical cases under the former law are *Wagner v. Shank,* 59 Md. 313; *Oland v. Insurance Co.,* 69 Md. 428.

[1] *Ante,* §151. See for a satisfactory treatment, Willoughby on the Constitution, secs. 530 *et seq.*

for taxation in connection with its intangible franchises, by a unit rule,—that is to say, not with regard alone to its intrinsic worth, but as a proportionate contributing factor to the total worth of the corporation.[1] And if a state taxing law, whatever the scheme, is substantially limited in scope to the intrastate operations and property of an interstate corporation, it will be upheld.[2]

Second. **Maryland statutes.** Except where special provisions are made for particular classes, a foreign corporation is assessed and taxed for its real and personal property in this state just as a natural person would be;[3] and the shares of such corporations owned by residents are assessed to them and taxed at a special rate provided by the Act of 1896, Chapter 143.[4] In addition to, and not

[1] *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194; *Western Union T. Co. v. Missouri,* 190 U. S. 412.

[2] The difficulty lies in the application of the principle. In *United States Express Co. v. Minnesota,* 223 U. S. 335, the statute assessed on an express company, organized in New York, "a tax of six per cent. upon its gross receipts for business done between points within this state, in lieu of all taxes upon its property,"—held valid. In *Meyer v. Wells, Fargo & Co.,* 223 U. S. 298, the state statute imposed a tax of three per cent. on such proportion of the gross receipts from every source as the portion of the business done within the state bears to the whole business. This was in addition to the "taxes levied and collected upon an *ad valorem* basis upon the property and assets of the corporation." The tax was held void as a regulation of commerce, because, in effect, a tax on gross receipts, and not a property tax measured by them. See, also, *Galveston R. Co. v. Texas,* 210 U. S. 217. See *Southern Rwy. Co. v. Greene,* 216 U. S. 400; and compare *Baltic Mining Co. v. Mass.,* 231 U. S. 68.

[3] Act of 1908, Chapter 240 (Code 1911, Art. 23, sec. 97).

[4] Code (1911), Art. 81, sec. 214,—which provides that all shares in foreign corporations, other than national banks, "owned by residents of this state shall be valued and assessed for the purpose of

as a substitution for, taxes upon the real and personal property situated here, an annual franchise tax is collectable from all foreign corporations except "railroad companies, telegraph or cable companies, express or transportation companies, oil or pipe line companies, title insurance companies, electric light or gas companies, guano, phosphate or fertilizer companies, electric construction companies, telephone companies, parlor-car or sleeping-car companies, safe deposit companies, trust companies, national banks, life, fire, marine, casualty and other insurance companies, and guaranty and fidelity companies, or any corporation paying a gross receipts tax which maintains an office and regularly exercises its franchises in this State."[1]

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state, county and municipal taxation to the owners thereof in the county or city in which such owners may reside, and said shares shall be assessed and valued at their actual value in the market, and those upon which no dividend shall be actually paid shall not be valued at all; and upon the valuation so made, the regular rate of taxation for state purposes shall be paid, and there shall also be paid on such valuation thirty cents (and no more) on each one hundred dollars for county, city and municipal taxation in such county or city of this state in which the owners may reside." See *Wilkins Co. v. Baltimore,* 103 Md. 293.

[1] Act of 1908, Chapter 240 (Code 1911, Art. 23, sec. 95). The rate of the tax is as follows: "The sum of twenty-five dollars for every full fifty thousand dollars of capital employed by it in this state up to five hundred thousand dollars, but in no case less than twenty-five dollars; if the amount of such capital is more than five hundred thousand dollars, and not more than five million dollars, then an additional amount equal to one-fortieth of one per cent. on the excess; and if more than five million dollars, then an additional amount at the rate of thirty dollars for every million dollars of such last named excess." For foreign insurance companies, see Code (1911), Art. 23, sec. 184; for railroads, see Art. 81, sec. 167 and annotations. Compare, in connection with these provisions, *Baltic Mining Co. v. Mass.,* 231 U. S. 68.

§ 176. **Receivers of foreign corporations.** It is the general rule that a judicial receiver acquires by his mere appointment, without possession, no title to any property beyond the jurisdiction and limits of the appointing court and state;[1] nor will the courts of another state recognize his title or right to sue. The tendency of recent cases is to modify the second branch of the rule; and it is now held by some, but not all, of the courts that comity requires the recognition of a foreign receiver, in all cases where this will not prejudice the rights of domestic creditors. The strict rule began, it is said, with the case of *Booth v. Clark,* 17 How. 322, in which a receiver appointed by a court of New York was denied the right to maintain a suit in the District of Columbia; and there has been no modification by the Supreme Court of this view.[2] In Relf *v. Rundle,* 103 U. S. 222, however, a noteworthy distinction is taken between a judicial receiver and a statutory successor of a dissolved corporation. In this case, the law of Missouri provided that upon the dissolution of insurance companies of that State, the assets should vest in the superintendent of the Insurance Department. The appellant was such Superintendent, and the question was as to his right to intervene in a proceeding instituted against the company by a policy-holder in Louisiana. The court said: "Relf is not an officer of the Missouri State court but the person designated by law to take the property of any dis-

[1] Differing herein from a conventional trustee. *Wilson v. Carson,* 12 Md. 54; *B. & O. R. R. v. Glenn,* 28 Md. 287. For a limitation upon the right of a conventional trustee to sue in a foreign state, see *Glenn v. Marbury,* 145 U. S. 499.

[2] In *Hale v. Allison,* 188 U. S. 70, the Court dissents from the view of some of the lower federal courts, and says that the rule in *Booth v. Clark,* has not been shaken, overruled or explained away.

solved life insurance corporation of that State. * * * He was the statutory successor of the corporation for the purpose of winding up its affairs. His authority does not come from the decree of the court but from the statute. * * * We are aware that except by virtue of some statutory authority * * * a receiver appointed by a state court has no extra-territorial power, but a corporation is the creature of legislation and may be endowed with such powers as its creator sees fit to give. * * * Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. By the charter of this corporation, if a dissolution was decreed its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs. Relf therefore became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. * * * He was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States."[1]

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[1] For the right of a state court to restrain citizens of the state from contesting the title of the court's receiver to assets in another state,—see *Cole v. Cunningham*, 133 U. S. 107. The modern tendency is, by legislation, to make liquidation receivers statutory successors of the corporation. See *Bernheimer v. Converse*, 206 U. S. 516; and *supra*, §131 and 166.

First. **The Maryland law.** So far as the right of a foreign receiver to maintain a suit here is concerned, the later cases have modified the doctrine of the Supreme Court. In *Bartlett v. Wilbur,* 53 Md. 493, the court, following *Booth v. Clark, supra,* says: "Strictly speaking, the powers and functions of a receiver for the purposes of litigation are limited to the courts of the state within which he was appointed; and he has no extra-territorial jurisdiction or power to institute suits in another state for the recovery of property due the person or estate subject to the receivership. * * * In some states, it is true, he has been permitted, upon the principle of comity, to file claims and receive money due the estate, but he has never been allowed by a foreign court to interfere with its jurisdiction, which had attached prior to his appointment." In *Lycoming Insurance Co. v. Langley,* 62 Md. 199, the appellant was a corporation of Pennsylvania which had gone into the hands of a receiver; and the suit was brought in the name of the corporation, for the use of the receiver, against a policy-holder in Maryland to recover assessments upon a premium note. It appeared that by the Pennsylvania statute, a receiver appointed for a dissolved insurance company was authorized to prosecute and defend suits in the name of the corporation, and the court held that, upon principles of comity, such a law should "be recognized in other jurisdictions as well as the original law creating the corporation." In *Day v. Postal Tel. Co.,* 66 Md. 354, the appellant had filed a creditor's bill against two corporations,—one of New York and the other of Maryland; and the bill prayed for the appointment of a receiver for the property of both companies in this state. At the time the proceeding was instituted, a receiver for the New York corporation had already been appointed by a competent

court of that state, and subsequently he filed a bill against the corporation here, praying that "the receivership created by the appointment of the Supreme Court of New York be extended over the property within the jurisdiction of this State." The court below consolidated the two cases,—as to which it was observed on appeal: "There was error in consolidating the bill filed by the receiver with that filed by the appellant and thus making one case of bills that sought to accomplish objects that would conflict the one with the other. Moreover, the receiver appointed by the court of New York, had no extra-territorial power to institute proceedings in the courts of this State, in regard to property not subject to the jurisdiction of the court from which he received his appointment. His functions and powers for purposes of litigation, are held to be limited to the courts of the State within which he was appointed, and the principles of comity between the states do not apply to a case like the present. Whatever exceptions may exist in certain cases to the general rule, it is clear that a case like the present does not fall within any of them." In *Castleman v. Templeman,* 87 Md. 546, the appellant was a creditor of an insolvent Virginia corporation,—for which a receiver had been appointed in that state; and the appellee was a shareholder whose stock had not been paid up. In support of the appellant's right to maintain the suit, it was urged that otherwise it would be without relief, because the Virginia receiver would have no standing in court here,—as to which the court said: "That the receiver could have instituted suits in the name of the company for his use, would seem to be clear. Whilst the company is shown to be insolvent, it has not been dissolved so far as the record discloses. * * * But under the circumstances of this case, the receiver was not confined to that

method of proceeding. We understand it to be conceded that there are no creditors of this company residing in this State. * * * The Courts of this State had not taken jurisdiction over the subject-matter of this suit or any of the property of the defendant, when this bill was filed. * * * Under these circumstances we can see no reason why the receiver should not be permitted to sue here,—not because he, as a matter of right, can demand recognition in this State, but through comity between the States which should permit the representative of the court of one state to sue in another, when such suit does not injuriously affect the interests of the citizens of the latter, or violate its policy or laws."[1]

In *Stockley v. Thomas,* 89 Md. 663, the appellant was the receiver of a mutual insurance company of Pennsylvania. The only assets here consisted of moneys due from Maryland policy-holders upon assessments,—the amount of which had been ascertained by the Pennsylvania court. The appellee was one of many Maryland creditors, and upon his bill, filed after the institution of the proceedings in Pennsylvania, the court appointed a Maryland receiver. Subsequently the appellant intervened and moved to rescind the order of the lower court. It was held that this motion should have been granted and that the appointment of a receiver by the lower court was irregular. It was said:

[1] The court proceeds to notice the general rule of territorial limitation and the tendency of the modern cases to substitute the exception for the rule. Finally it is said: "It will not be out of place to say that when a receiver appointed by the court of one state desires to sue in a court of another state, it would be a proper practice for him to file a petition setting forth such facts as we have indicated as sufficient to enable him to do so in the latter court, asking permission to sue."

"Undoubtedly a Maryland court of equity will, in a proper case, appoint a receiver here to take charge of and sell the property of an insolvent foreign corporation to pay, first, the debts of Maryland creditors,[1] and if there be any balance remaining, to turn it over to a receiver appointed in another state upon a proper application made here for that purpose. * * * But, before the jurisdiction of a court of equity can be successfully invoked, it must clearly appear that the receiver who is to be appointed, will be able to exercise the powers proposed to be conferred upon him. * * * If it be true that neither the plaintiffs nor the receiver appointed by the Circuit Court of Baltimore City on their application, can make assessments, and if there be no other way by which money can be collected to pay their debt then, *ex necessitate,* whether there be creditors here or not, the foreign receiver must be recognized for this purpose at least."

The rule however that a foreign receiver takes, by virtue of his appointment merely, no title to assets in the state,—remains unimpaired. In *Linville v. Hadden,* 88 Md. 594, the appellees were New York creditors of a Connecticut corporation,—for which a receiver was appointed by a competent court of that state, in April, 1895. In December of the same year, they caused to be issued from the Superior Court of Baltimore City a foreign attachment, and it was laid in the hands of the appellant, as garnishee. The attachment was upheld against the claim of the Connecticut receiver,—the court saying: "The decree appointing the receiver in Connecticut had no extra-territorial

[1] But for the right to discriminate between Maryland creditors and those of other states who choose to file their claims here,—see *contra, Blake v. McClung,* 172 U. S. 239.

force, and therefore, although while a citizen of that State might not be allowed to set up a claim either there or here which ignored the validity of that decree; yet citizens of this State, or of other States than Connecticut, are not bound by it, outside of the last named State; and in spite of the Connecticut decree, either our own citizens or the citizens of third states may proceed here to collect their debts. * * * It is or must be conceded under the decisions of this court that the Connecticut proceedings and the decree therein have no force here, except, perhaps, to enable the receiver who was thereby appointed to ask permission in certain cases to sue in the Maryland courts."[1]

§ 177. **National Banks.** A national banking association is not only a corporation of the United States, but it also presents a common type of federal agency. No state can exclude it, or condition its operations, or tax the corporate entity and franchise. It happens, however, that for purposes of procedure and for certain purposes of taxation, Congress has placed a national bank substantially in the position of a domestic corporation of the state in which it is located.

First. **Procedure.** By the Acts of March 3, 1887, and August 13, 1888, it is provided: "All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The

[1] Of course the foreign receiver may perfect his title to property in another state by taking possession before other rights attach.

provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof or cases for winding up the affairs of any such bank." [1]

Second **Attachments.** Neither the property nor the credits of a national bank can be seized by a writ of attachment issued before judgment,—whether out of a state or federal court.[2] But a national bank may be garnished for the debt of any person to whom it is indebted; and so may be its receiver.[3]

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[1] As to local actions,—see *Casey v. Adams,* 102 U. S. 66; for winding up, and the concurrent jurisdiction of state and federal courts,—see *ante* §119 and *Lake National Bank v. Wolfeborough,* 78 Fed. 517.

[2] *Butler v. Coleman,* 124 U. S. 721,—construing section 5242 of the Revised Statutes, providing that: "No attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceedings, in any state, county or municipal court." The courts of the United States are not authorized to issue attachments in common law causes against the property of a defendant, except as provided by the laws of the state in which such court is held, for the courts thereof.

[3] *Earle v. Pennsylvania,* 178 U. S. 449; *Earle v. Conway,* 178 U. S 456. In the latter case it is said: "Such an attachment cannot create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. After the service of the attachment upon the receiver, it became his duty to report the facts to the Comptroller, and it then became the duty of the latter to hold any funds coming to his hands, through the Treasurer of the United States, as the proceeds of sale of the bank's assets subject to any interest

Third. **Taxation.** By section 5219 of the Revised Statutes it is provided: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the State subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The provisions of this section have been fruitful of litigation;[1] and the following are the more important results established: (1) A tax imposed upon the corporate entity and its franchise, is not the legal equivalent of a tax upon the shares and real estate,—and is void.[2]

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which the plaintiff may have legally acquired therein as against his debtor under the attachment issued on the judgment in his favor in the state court."

[1] See for example, the cases collected in 45 L. R. A. 737.

[2] *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664. So of a direct tax on the personal property of the bank,—*San Francisco v. National Bank,* 92 Fed. 273. In *Frederick County v. Farmers Nat. Bank,* 48 Md. 117, an attempt to tax both the shares and the real estate of the appellee, was held to be double taxation. See,

(2) The bank may be required to pay the tax upon its shares and charge the payment to the stockholders; and the cashier may be required to transmit to the state official, a list of shareholders and their holdings.[1] (3) The forbidden discrimination between capital invested in bank shares and "other moneyed capital in the hands of individual citizens,"—refers only to such capital as, by its employment, comes into competition with the business of national banks.[2] (4) Where no substantial discrimina-

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further, *First Nat. Bank v. Albright*, 208 U. S. 548,—to the effect that the national banking act contemplates taxation on the shares and the real estate only.

[1] *Citizens Nat. Bank v. Kentucky*, 217 U. S. 443; *First Nat. Bank of Aberdeen v. Chehalis County*, 166 U. S. 440; *Merchants Nat. Bank v. Pennsylvania*, 167 U. S. 461; *Waite v. Dowley*, 94 U. S. 527.

[2] *Commercial Nat. Bank v. Chambers*, 182 U. S. 556. Considerable difficulty exists in determining (*a*) what capital competes with national banks; and (*b*) whether a particular statute creates an unlawful distinction. For cases of savings banks and trust companies see: *Merchants' Nat. Bank v. New York*, 121 U. S. 138; *Jenkins v. Neff*, 186 U. S. 230; *National Bank of Baltimore v. Baltimore*, 92 Fed. Rep. 239—affirmed 100 Fed. Rep. 24. In *First Nat. Bank of Aberdeen v. Chehalis County*, 166 U. S. 440, the earlier decisions for and against particular state statutes, are reviewed and, among other things, it is said: "The business of banking as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and

tion[1] is made by the state law between bank and other shares constituting competing moneyed capital,—the fact that some of the assets of the bank are invested in government bonds and other non-taxable securities, does not exempt such shares, *pro tanto,* from assessment for taxation.[2] (5) Ordinarily, as we have seen, a state may require its citizens to pay taxes on shares owned by them in corporations of another state,—although the same shares may be taxed in the corporate domicil. By the express provision of the act of Congress, however, national bank shares are taxable only by the state in which the bank is located,—and this without regard to the residence of the shareholders.

Fourth: **The Maryland statutes.** By Code (1911) Art. 81, secs. 2, 162, shares in national banks located

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capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. * * * The terms of the act of Congress therefore include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities, by way of loan, discount or otherwise, which are from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale and repayment and re-investment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property." See, further, *San Francisco Nat. Bank v. Dodge,* 197 U. S. 70.

[1] *Bank v. Ayres,* 160 U. S. 660.

[2] *Van Allen v. Assessors,* 3 Wall. 573; *People v. Commissioners of Taxes,* 71 U. S. 244.

here are valued by the State Tax Commissioner and assessed to the owners thereof in the county or city in which they reside,—as the shares of Maryland corporations would be. Shares owned by non-residents are assessed to them in the "assessment district in which the bank * * * may have its principal place of business in this State."

APPENDIX I.

UNIFORM STOCK TRANSFER ACT.

LAWS OF MARYLAND 1910.

CHAPTER 73.

AN ACT to add certain sections to Article 23 of the Code of Public General Laws, title "Corporations," sub-title "Capital Stock," as amended by Chapter 240 of the Acts of the General Assembly of Maryland of 1908, said sections to follow immediately after Section 37 of said Chapter 240, and to be designated as Sections 37A to 37X, both inclusive, providing for the transfer of shares of stock in corporations.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That certain new sections be and the same are hereby added to Article 23 of the Code of Public General Laws, title "Corporations," sub-title "Capital Stock," said new sections to follow immediately after Section 37 of the Acts of 1908, Chapter 240, and to be designated as Sections 37A to 37X, both inclusive, and to read as follows:

SEC. 37A. That title to a certificate and to the shares represented thereby can be transferred only—

(a) By delivery of the certificate, endorsed either in blank or to a specified person, by the person appearing by the certificate to be the owner of the shares represented thereby; or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable, although the charter or articles of incorporation, or code of regulations, or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation, or shall be registered by a registrar, or transferred by a transfer agent.

SEC. 37B. Nothing in this Act shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid endorsement, assignment or power of attorney.

SEC. 37C. Nothing in this Act shall be construed as forbidding a corporation

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares.

SEC. 37D. The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate, with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

SEC. 37E. The delivery of a certificate to transfer title, in accordance with the provisions of Section 37A, is effectual, except as provided in Section 37C, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

SEC. 37F. The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in Section 37G, though the indorser or transferor

(a) Was induced by fraud, duress or mistake to make the indorsement or delivery; or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement, or delivery of the certificate; or

(c) Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate; or

(d) Has received no consideration.

SEC. 37G. If the indorsement or delivery of a certificate

(a) Was procured by fraud or duress; or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) Without authority from the owner; or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded; unless

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful; or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof, and, pending litigation, may enjoin the further transfer of the certificate or impound it.

SEC. 37H. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

SEC. 37I. The delivery of a certificate by the person appearing by the certificate to be the owner thereof, without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

SEC. 37J. An attempted transfer of title to a certificate or to the shares represented thereby, without delivery of the certificate,

shall have the effect of a promise to transfer, and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

SEC. 37K. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—

(a) That the certificate is genuine;

(b) That he has a legal right to transfer it; and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

SEC. 37L. A mortgagee, pledgee or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby.

SEC. 37M. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

SEC. 37N. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process.

SEC. 37O. There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation, and there shall be no restriction upon the transfer of shares so

represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

SEC. 37P. The alteration of a certificate, whether fraudulent or not, and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby.

SEC. 37Q. In any case not provided for by this Act the rules of law and equity, including the Law Merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall govern.

SEC. 37R. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

SEC. 37S. A certificate is indorced when an assignment or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed, though it has not been delivered.

SEC. 37T. The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special endorsement may be made with like effect.

SEC. 37U. (1) In this Act, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this State, or of another State whose laws are consistent with this Act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this State, or of another State whose laws are consistent with this Act.

"State" includes State, Territory, District and Insular Possessions of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

SEC. 37v. The provisions of this Act apply only to certificates issued after taking effect of this Act.

SEC. 37w. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SEC. 37x. This Act may be cited as the Uniform Stock Transfer Act.

SEC. 2. *Be it further enacted,* That this Act shall take effect from and after the first day of July, 1910.

Approved April 11, 1910.

APPENDIX II.

SCALE OF CHARGES AND FEES.

Scale of Charges and Fees.

Domestic Corporations.

To be paid State Tax Commissioner:

Recording certificate (skeleton form (1), *infra*), with State Tax Commissioner and clerk of court. $3.

Recording long certificate, such as form (2), *infra*. $8.*

Bonus tax: one-eighth of one per cent. of authorized capital (same amount for any subsequent increase of capital).

No annual franchise tax.

Foreign Corporations.

Recording initial certificate with Secretary of State. $25.00.
Recording annual certificate with Secretary of State. $1.
Annual franchise tax to be paid to State Treasurer, $25 for every full fifty thousand dollars of capital employed in Maryland up to five hundred thousand dollars, but in no case less than $25. If the amount of such capital is more than five hundred thousand dollars and not more than five million dollars, then an additional amount equal to one-fortieth of one per cent. on the excess; and if more than five million dollars, then an additional amount at the rate of $30 for every million dollars of such last named excess.

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*The amount varies with the length of the certificate. Code 1911, Art. 23, sec. 4, provides that at the time of receiving the certificate, the State Tax Commissioner shall collect double the fees allowed by law to clerks of courts for recording a document of similar length.

APPENDIX III.

FORMS.

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NOTE.—Acknowledgment is due Henry W. Williams, Esq., for permission to make use of the forms published in his valuable compilation of the laws of Maryland relating to corporations, and to the Southern Stamp and Stationery Company, of Richmond, Va., for permission to make use of the forms contained in their useful publication, "The International Corporation Record."

(1)
Certificate of Incorporation.
(*Skeleton.*)

THIS IS TO CERTIFY that the subscribers (*giving names and places of residence*), of whom ——— is a citizen of the State of Maryland, all being of full legal age, do hereby certify that we do, under and by virtue of the general laws of this State, authorizing the formation of corporations, associate ourselves with the purpose of forming a corporation.

1. The name of the corporation is ———

2. The purpose for which the said corporation is formed and the business or objects to be carried on and promoted by it are ———, and the said corporation is formed upon the articles, conditions and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of this State.

3. The principal office of said corporation in this State will be located in ———.

4. The total amount of the capital stock of the said corporation is ——— dollars, divided into ——— shares, of the par value of ——— dollars each.

5. The said corporation shall have ——— ( ) directors and that (*insert names of directors for first year*) of whom ——— is a citizen of the State of Maryland and actually resides therein, shall act as such for the first year or until their successors are duly chosen and qualified.

IN WITNESS WHEREOF, We have hereunto set our hands this ——— day of ———, in the year nineteen hundred and ———.

Witness.

STATE OF
COUNTY OF } *to wit:*

Before the subscriber, a ——— of the State of ———, in and for the ——— of ———, personally appeared ——— on this ——— day of ———, nineteen hundred and ———, and did severally acknowledge the foregoing certificate to be their act.

———

I, ——— one of the Judges of the ———, do hereby certify that the foregoing certificate has been submitted to me for examination;

and I do further certify that the said certificate is executed in conformity with the law.

Note—The above form may be used (setting forth very briefly the business and objects of the corporation) if it is not desired that the corporation shall have any preferred stock or that any special provisions be adopted for the purpose of defining, limiting and regulating the powers of the corporation and of the directors and stockholders or any class of stockholders. If special provisions with reference to preferred stock, powers, etc., are desired, the various provisions of form (2), infra, may be adapted to meet the desired end.

(2)

Certificate of Incorporation.

(*Containing various provisions.*)

THIS IS TO CERTIFY, That the subscribers (*recite names and places of residence*), being all of full legal age, and of whom ——— is a citizen of the State of Maryland, do hereby associate themselves with the intention of forming a corporation under and by virtue of the general laws of this State authorizing the formation of corporations.

1. The name of said corporation is ———

2. The purposes for which and for any of which the corporation is formed and the business and objects to be carried on and promoted by it are as follows: (To manufacture, purchase, sell and otherwise deal in ———, and stock, wares and merchandise of all kinds and descriptions and any and all parts thereof; to manufacture, purchase, sell and otherwise deal in all supplies and raw and other materials used in the manufacture thereof, to lease, purchase, sell and otherwise deal in all machinery, tools, implements, apparatus, equipment and appliances of every kind used in connection with the manufacturing carried on by the corporation or with the selling and transportation of the finished and other products manufactured, sold, owned or used by it; and to purchase, own, hold, lease, convey, mortgage, pledge, transfer or otherwise acquire or dispose of lands, water rights, mills, factories, buildings and other structures, and all other property, both real and personal, of every class and description, or any interest therein, necessary or desirable for the carrying on of the aforesaid businesses or either of them.

To purchase, sell, mortgage, lease, improve, invest and deal in real estate, wheresoever situated, and to construct, equip, operate, lease, rent, hire and manage buildings of every kind and description.

(To acquire by purchase, lease or otherwise, the property, rights, business, good will, franchises and assets of every kind of any corporation, association, firm or individual carrying on in whole or in part the aforesaid businesses, or either of them, or any other business in whole or in part that the corporation may be authorized to carry on, and to undertake, guarantee, assume and pay the indebtedness and liabilities thereof and to pay for any property, rights, business, good will, franchises and assets so acquired in the stock, bonds or other securities of the corporation or otherwise.)

To apply for, acquire, hold, use, sell, mortgage, license, assign or otherwise dispose of letters patent of the United States or any foreign country, and any and all patent rights, licenses, privileges, inventions, improvements, processes and trade-marks relating to or useful in connection with any business carried on by the corporation.

To carry on any other business (whether manufacturing or otherwise) which may seem to the corporation to be calculated directly or indirectly to effectuate the aforesaid objects, or either of them, to facilitate it in the transaction of its aforesaid business, or any part thereof, or in the transaction of any other business that may be calculated, directly or indirectly, to enhance the value of its property and rights.

The business which the corporation is to carry on is from time to time to do any one or more of the acts and things hereinbefore set forth, provided that, in the transaction of its business, the corporation shall be subject to the laws and statutes of each State or foreign country in which the same may be transacted or its property may be located.

3. The principal office of said corporation in this State will be located at ———.

4. The total amount of capital stock of said corporation is ——— dollars ($), divided into ——— ( ) shares of the par value of ——— dollars ($) each.

Of the said authorized capital stock ——— ( ) shares thereof, amounting to ——— dollars ($), shall be preferred stock, and ——— ( ) shares thereof, amounting to ——— dollars ($), shall be common stock.

The holders of the preferred stock shall be entitled to receive, when and as declared by the board of directors, out of the surplus or net profits of the corporation, annual dividends at the rate of, but not exceeding ——— per centum per annum payable on dates to be fixed by the by-laws. The annual dividends on the preferred stock shall be paid or declared and set apart before any dividends on the common stock shall be paid or declared and set apart, and the dividends shall be cumulative, so that if in any year dividends amounting to the full ——— per centum shall not have been paid on the preferred stock, the deficiency shall be paid before any dividends shall be paid upon or declared as payable and set apart for the common stock.

In the event of the liquidation, dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full, both the par amount of their shares and all dividends accumulated and unpaid thereon, before any amount shall be paid to the holders of the common stock, and after the payment to the holders of the preferred stock of its par value and the dividends accumulated and unpaid thereon, the remaining assets and funds of the corporation shall be divided and paid to the holders of the common stock according to their respective shares.

Whenever in any year the full annual dividend on the preferred stock shall have been paid or declared as payable and set apart and any dividends accumulated and unpaid thereon shall have been fully paid, the board of directors of the corporation may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits; provided, however, that no dividend on the common stock shall at any time be paid, either in cash or otherwise, if such payment would reduce the actual surplus of the corporation to an amount less than ——— per centum of the par value of the total amount of the issued and outstanding preferred stock, nor, whenever the actual surplus of the corporation is less than ——— per centum of the par value of the issued and outstanding preferred stock, shall any dividend on the common stock be declared or paid unless at the time of the declaration thereof there shall be added to the surplus out of the net profits an amount equal to not less than ——— of the total common stock dividend declared.

The preferred stock shall be redeemable, in whole or in part, at

the option of the corporation, upon any dividend paying dates at any time after ——— years from the issue thereof, at the price of ——— dollars ($) in cash and interest thereon. In case of the redemption at any time of less than the total outstanding amount of the preferred stock, such redemption shall first be made pro rata among the then holders of the preferred stock.

At all elections of directors of the corporation each stockholder shall be entitled to as many votes as shall equal the number of his shares, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for or any two or more of them, as he may see fit.

The authorized amount of the preferred stock shall not be increased nor shall any stock having preference or priority over, or equality with, the preferred stock either in respect of dividend, assets or otherwise be authorized or issued by the corporation, nor shall any mortgage or bonded indebtedness be created by it except with the consent in writing, or by vote at a meeting duly called, of the holders of not less than two-thirds in amount of both the preferred and common stocks issued and outstanding; provided, however, that the board of directors shall have power, without any consent, at any time or times, to authorize the execution and delivery of purchase money mortgages covering specific properties that may be purchased by the corporation or the assumption by it of obligations secured by mortgage on such properties.

5. The said corporation shall have ——— ( ) directors, and (*insert names of directors for first year*) of whom ——— is a citizen of the State of Maryland and actually resides therein, shall act as such for the first year or until their successors are duly chosen and qualified.

6. The management of the property, business and affairs of the corporation shall be vested in the board of directors, who shall dictate its general business policy, and, subject to any provisions of statute or to vote of its stockholders, determine all matters and questions pertaining to its business and affairs. In addition to the aforesaid general powers, and to the powers conferrd by Statute, the board of directors shall have power to open stock books, to fix and to vary the amount to be reserved as working capital, to direct and determine the use and disposition of any surplus and net profits over and above the capital stock paid in, to determine (sub-

ject to the limitations hereinbefore set forth) whether any, and, if any, what part of any surplus or net profits shall be declared in dividends and when paid to its stockholders, and from time to time to sell, assign, transfer the lease or otherwise dispose of any or all of the property and assets of the corporation, but no lease or sale of all the property, assets and franchises of the corporation as an entirety shall be made except after first obtaining the affirmative vote at a duly called meeting, of the holders of not less than ——— per centum of all the issued and outstanding capital stock of the corporation, nor shall any such sale be made for other than a cash consideration except after first obtaining the affirmative vote at a duly called meeting, of the holders of not less than ——— per centum of all the issued and outstanding capital stock of the corporation.

The board of directors shall from time to time determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation except as conferred by the Statutes of Maryland or as authorized by the board of directors or by a resolution of the stockholders.

The above granted powers to the corporation and to the board of directors thereof are in furtherance and not in limitation of the general powers conferred by law upon the directors and the corporation.

IN WITNESS WHEREOF, We have hereunto set our hands this ——— day of ———, in the year nineteen hundred and ———.

Test: _____

_____

_____

(Add acknowledgment and certificate of judge, as in form (1), *supra.*)

(3)
Articles of Amendment.

The undersigned, being the president and majority of the directors of the ———, a corporation of the State of Maryland, DO HEREBY CERTIFY that at a meeting of the stockholders of said corporation duly warned and held as provided by law, at the principal office of said corporation at ———, within the State of Maryland, on the ——— day of ———, 19 , the said corporation, by the affirmative vote of a majority of all its stock (or by the affirmative vote of a majority of each class of stock) outstanding and entitled to vote, did amend its certificate of incorporation by:

(a) adding to its corporate powers and purposes, additional powers and purposes as follows, to wit:

(b) changing the name of said corporation to ———.

(c) changing the corporate business from ———.

(d) increasing the capital stock of said corporation from ——— dollars to ——— dollars.

AND WE DO FURTHER CERTIFY, That the total amounts of capital stock already authorized and issued are ——— dollars of preferred and ——— dollars of common stock, and for said stock already issued, ——— dollars has been paid in cash to the corpora- and that ——— dollars of said stock has been issued for property and ——— dollars for services, and that the amount of additional stock authorized is ——— dollars, divided into ——— shares of common stock and ——— shares of preferred stock, of the par value of ——— dollars each. (*Set out herein the restrictions, if any, imposed upon the transfer of shares, and if the capital stock is to be classified, the preferences, voting powers, restrictions and qualifications of the preferred stock.*)

(e) decreasing the capital stock of said corporation from ——— dollars to ——— dollars.

AND WE DO FURTHER CERTIFY, That the total amounts of capital stock authorized and issued are ——— dollars of preferred stock and ——— dollars of common stock, and that the amount of the reduction of the capital stock is ——— dollars, to be effected in the following manner: (*set out how to be effected*), and that the following is a copy of the resolution authorizing the reduction. (*Copy of resolution.*)

AND WE DO FURTHER CERTIFY, That the amount of unsecured debts and liabilities of said corporation have been so far paid and satisfied as not to exceed the amount to which the capital stock is reduced.

(f) reducing the number of outstanding shares from ——— shares to ——— shares, the capital stock of the corporation having become so impaired by losses that such amount now represents the true value of the outstanding shares.

AND WE DO FURTHER CERTIFY, That the number of shares originally authorized was ——— shares of which ——— shares were actually issued and outstanding, and that the number of shares as reduced will be ——— shares, and that ——— shares, being the difference between the number of shares originally authorized and the number of shares as reduced, may be re-issued to be divided into ——— shares of common stock and ——— shares of preferred stock, of the par value of ——— dollars each. (*Set out herein the restrictions, if any, imposed upon the transfer of shares, and if the capital stock is to be classified, the preferences, voting powers, restrictions and qualifications of the preferred stock.*)

IN WITNESS WHEREOF, We have hereunto set our hands this ——— day of ——— in the year nineteen hundred and ———.

———, President.

———

———

being a majority of the directors of the ———.

Test:

STATE OF MARYLAND. }
COUNTY OF } *ss.*

I HEREBY CERTIFY, That on this ——— day of ———, in the year nineteen hundred and ———, before me, the subscriber, a ——— of the State of ———, in and for ——— aforesaid, personally appeared the above named ———, president, and ———, ——— directors of the ———, and did severally acknowledge the certificate to be their act.

———

I, ———, one of the judges of the ——— of ——— do hereby certify that the foregoing certificate has been submitted to me for examination; and I do further certify that the said certificate is executed in conformity with the law.

———

(4)
Agreement of Consolidation.

This agreement of consolidation made this ——— day of ———, 19 , between ———, and ———, both corporations incorporated under the laws of the State of Maryland, witnesseth:

WHEREAS, The board of directors of each party hereto have duly approved this agreement of consolidation; and

WHEREAS, This agreement of consolidation was submitted to the stockholders of the ———, at a meeting thereof duly warned in accordance with the provisions of Section 15 of Article 23 of the Public General Laws of Maryland, and duly held at the principal office of said corporation at ———, on the ——— day of ———, 19 , and was thereupon approved by the affirmative vote of two-thirds of all the stock of said corporation outstanding and entitled to vote, and was duly submitted to the stockholders of the ———, at a meeting thereof duly warned in accordance with the provisions of Section 15 of Article 23 of Public General Laws of Maryland, and duly held at the principal office of said corporation at ———, on the ——— day of ———. 19 , and was thereupon approved by the affirmative vote of two-thirds of all the stock of said corporation outstanding and entitled to vote;

NOW, THEREFORE, This agreement witnesseth:

1. That the said corporations shall be consolidated upon the following terms and conditions, to wit:

2. That said consolidation shall be carried into effect in the following manner, to wit:

3. That the name of the corporation to be formed by this consolidation shall be ———.

4. That the new corporation shall have ——— directors, and the following are the names and places of residence of the first directors and of the officers of such new corporation: ———, directors; ———, president; ———, vice-president; ———, secretary, etc.

5. That the number of shares of the capital stock of the new corporation shall be ———, divided into ——— shares of common, and ——— shares of preferred, of the par value of ——— dollars each. (Setting out the preferences, voting power, restrictions and qualifications of the preferred stock.)

6. That the capital stock of each of said consolidating corporations shall be converted into stock of said new corporation, as follows, to wit:

7. (Such other provisions and details as shall be deemed necessary to perfect the consolidation of said corporations.)

IN WITNESS WHEREOF, the said consolidating corporations have hereunto attached their corporate seals, attested by the signatures of their presidents and secretaries.

STATE OF MARYLAND, }
COUNTY OF } *ss.*

On this ——— day of ———, 19 , personally appeared before me, a ——— of the State of Maryland in and for ———, ———. president (or vice-president) of ———, which executed the foregoing instrument and acknowledged to me that he executed the same to be the act and deed of said ———.

(Here add another similar form of acknowledgment to be taken on behalf of the other corporation.)

(5)
By-Laws.

ARTICLE I.

STOCKHOLDERS.

Section First. The annual meeting of stockholders for the election of directors and for the transaction of any other business that may come before the meeting shall be held at the office of the company in ———, on the last ——— of every year, at ——— o'clock in the afternoon, and notice thereof shall be given by mail at least ——— days prior to the meeting, to each stockholder of record at his address, as the same shall appear on the books of the company.

Section Second. The polls for such elections shall be opened at ——— and shall close at ———.

Section Third. At any time in the interval between regular meetings, extraordinary meetings of the shareholders may be called by the president, or by a majority of the board of directors, or by a majority of the executive committee, upon ten days' written or printed notice, stating the place, day and hour of such meeting and the business proposed to be transacted thereat; such notice shall be given to each shareholder by leaving the same with him or at his residence or usual place of business, or by mailing it, postage prepaid, and addressed to him at his address, as it appears upon the books of the corporation; and no business shall be transacted at such meetings except that specially named in the notice.

Section Fourth. Upon the request in writing delivered to the president or secretary or any director, of the holders of a majority of all the shares outstanding and entitled to vote, it shall be the duty of such president, secretary or director to call forthwith a meeting of the shareholders. Such request shall state the purpose of the meeting, and notice thereof shall be given as required by the next preceding section. If the person to whom such request in writing shall have been delivered shall fail to issue a call for such meeting within three days after the receipt of such request, then the shareholders owning a majority of the voting shares may do so by giving fifteen days' notice of the time, place and object of the meeting by advertisement inserted in a newspaper published in the county or city in which the principal office of the corporation is situated.

Section Fifth. At all meetings of stockholders any stockholder shall be entitled to vote by proxy. Such proxy shall be in writing, and dated, but need not be sealed, witnessed or acknowledged, and shall be filed with the secretary at or before the meeting.

Section Sixth. If at any annual or special meeting of stockholders a quorum shall fail to attend in person or by proxy, a majority in interest of the stockholders attending in person or by proxy may, without further notice, adjourn the meeting from time to time, not exceeding ——— days at any one time, to the same place, until a quorum shall attend, and thereupon any business may be transacted which might have been transacted at the meeting as originally called, had the same been then held.

Section Seventh. No share of stock shall be voted on at any election which has been transferred on the books of the company within ——— days of such election.

ARTICLE II.

Directors.

Section First. The property, business and affairs of the company shall be managed by a board of ——— directors, who, after the expiration of the term of the present directors, shall hold office for a term of ——— years and until their successors are elected and qualified, except that the directors elected at the next meeting shall be divided into ——— classes, who shall hold their offices, respectively, for one, two, etc., years, and thereafter ——— directors shall be elected each year.

Section Second. If the office of any director becomes vacant by death, resignation, or otherwise, a special meeting of the shareholders may be called by the president, or by a majority of the board, or by a majority of the executive committee, in accordance with the requirements of Article I, sec. *Third,* of these By-Laws, for the purpose of electing a successor, who shall hold office until the next regular election for the office so filled, and until the election and qualification of his successor.

Section Third. The board of directors shall meet for the election of officers and for the transaction of any other business, immediately after the annual meeting of stockholders, and other regular meetings of the board shall be held at ——— o'clock on the ——— of each month.

Section Fourth. One day's written notice shall be given of all regular meetings of the board of directors.

Section Fifth. Special meetings of the board of directors may be called by the president or by any two directors by notice served personally upon each director, or mailed, telegraphed or telephoned to his address upon the books of the company, at least ——— days prior to the meeting.

Section Sixth. Regular and special meetings of the board of directors shall be held at such place, in or out of the State of Maryland, as the board may from time to time determine.

Section Seventh. A majority of the board of directors shall constitute a quorum for the transaction of business, but if, at any meeting of the board, there be less than a quorum present, the members at the meeting may, without further notice, adjourn the same from time to time, not exceeding ten days at any one time, until a quorum shall attend.

Section Eighth. For his attendance at any meeting of the board of directors, or at any committee of the board, each director shall receive the expenses incurred by him in attending such meeting and also the sum of ——— ($).

Section Ninth. The directors shall appoint from their number an executive committee consisting of ——— members, which shall have and exercise, subject to the control of the board of directors, all the powers of the board requisite for the conduct, management and development of the company's business; and when the board is not in session, the executive committee shall have and may exercise all the powers of the board. It may fill vacancies among the officers of the company, but any officer appointed by the executive committee may be removed by the board of directors. A majority of the executive committee shall be a quorum for the transaction of business. The executive committee may hold its meetings at any place designated by themselves, and may prescribe and regulate what, if any, notice shall be given of meetings of the committee.

ARTICLE III.

Officers.

Section First. The officers of the company shall consist of a president, ——— vice-presidents, a treasurer and a secretary, and the said officers shall hold office for one year or until their successors are elected and qualify. The said officers shall be elected by a majority vote of the board of directors, and none of them, except the president and ——— vice-presidents, need be a member of the board of directors. Any two of said offices, except those of president and vice-president, may, at the discretion of the board of directors, be held by the same person. The Board of Directors may from time to time appoint such other officers and agents with such powers and duties as they deem necessary.

Section Second. Any vacancy in any office shall be filled by a majority vote of the board.

The President.

Section Third. The president shall preside at all meetings of the board of directors and shall have general and active management of

the business of the company. He shall sign and seal certificates of stock, and shall have the general superintendence and direction of all the officers of the company, and shall see that their duties are properly performed.

The president shall submit a report of the operation of the company for the year, and of the state of its affairs, on the ———, to the directors at their regular meeting in ——— of each year, and from time to time shall report to them all matters within his knowledge, which the interests of the company may require to be brought to their notice.

The Vice-Presidents.

Section Fourth. The vice-presidents shall, in their order, be vested with all the powers and required to perform all the duties of the president in his absence. They may sign certificates of stock, and shall perform such other duties as may be prescribed by the board of directors or the executive committee.

President Pro Tem.

Section Fifth. In the absence of the president and the said vice-presidents the board may appoint a president pro tem.

The Treasurer.

Section Sixth. The treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the company, and shall deposit all moneys and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the board of directors or executive committee. He shall disburse the funds of the company as may be ordered by the board, taking proper vouchers for such disbursements, and shall render to the president and the directors at the regular meetings of the board, or whenever they may require it, an account of all his transactions as treasurer and of the financial condition of the company, and at the regular meeting of the board in ——— annually, he shall make a like report for the preceding year. He shall give the company a bond in an amount and with security satisfactory to the board of directors or to the executive committee, for the faithful performance of the duties of his office and the restoration to the

company, in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the company, and containing such other provisions as the board of directors or executive committee may require. Certificates of stock, when signed by the president or a vice-president, shall be countersigned by the treasurer. He shall keep the accounts of stock registered and transferred in such form and manner and under such regulations as the board of directors may prescribe. The board of directors or the executive committee may also appoint an acting or assistant treasurer or treasurers as permanent or temporary officers.

The Secretary.

Section Seventh. The secretary shall record all the votes and proceedings of the stockholders and of the directors, in a book kept for that purpose. He shall perform such other duties as pertain to his office or as the president, the board of directors or the executive committee may require. In the absence of the secretary from any meeting of the stockholders or directors, the record of the proceedings shall be kept and authenticated by such other person as may be appointed for that purpose at the meeting. The board of directors or the executive committee may also appoint an acting or assistant secretary or secretaries as permanent or temporary officers.

ARTICLE IV.

Checks, Notes, Etc.

Section First. All checks, notes and orders for the payment of money shall be signed by the treasurer or any other officer or agent of the company designated by vote of the board of directors.

Section Second. All promissory notes and acceptances shall be signed by the president or vice-president and the treasurer.

ARTICLE V.

Fiscal Year, Working Capital and Dividends.

Section First. The fiscal year of the company shall commence on the first day of ——— in each year and end on the following 31st day of ———.

Section Second. The board of directors may declare dividends from the surplus or net profits of the company over and above the amount which from time to time may be fixed by the board as working capital.

Section Third. The dates for the declaration of dividends upon the preferred stock shall be the days fixed by these by-laws for the regular monthly meetings of the board of directors in the month of ——— in each year; on which days the board of directors, in its discretion, shall declare what, if any, dividends shall be declared upon the preferred stock; provided, however, that the board shall have the right on either of said days or at any other time to declare dividends on the preferred stock out of the surplus or net profits and to declare the preferred stock dividend, for the whole or any part of the current year. The dividends on the preferred stock shall be payable ——— on the ———.

Section Fourth. Whenever in any year the full annual dividend on the preferred stock shall have been paid, or declared as payable and set aside, and all the dividends accumulated and unpaid thereon shall have been fully paid, the board of directors, in its discretion, but subject to the limitations set forth in the certificate of incorporation, shall declare what, if any, dividend shall be paid on the common stock, and any dividend so declared shall be paid at such time or times as the board shall determine.

ARTICLE VI.

Seal.

The seal of the company shall be circular in form, with the words "———," thereon.

ARTICLE VII.

Stock.

Section First. Certificates of stock shall be issued and signed by the president and by the treasurer, and sealed with the seal of the company.

Section Second. All transfers of stock shall be made on the books of the company by the holder of the shares in person or by his attorney upon surrender and cancellation of certificates for a like number of shares.

Section Third. The board of directors shall have power and authority to make all such rules and regulations as they may deem expedient concerning the issue and registration of certificates of stock.

Section Fourth. The stock transfer books shall be closed for the payment of dividends during such periods, if any, as from time to time may be fixed by the board of directors, and during such periods no stock shall be transferable on the books.

Section Fifth. In case any certificate of stock is lost, mutilated or destroyed, the board of directors may issue a new certificate in place thereof upon such terms and conditions as it may deem advisable.

ARTICLE VIII.

Order of Business for Annual Meetings of Stockholders.

Section First.

1. Organization of meeting.
2. Statement by secretary of the number of shares of stock represented in person or by proxy.
3. Submission by secretary of certificate of service of notice of meeting and verified alphabetical list of stockholders.
4. Reading of minutes of last stockholders' meeting.
5. Reports.
6. Appointment of tellers.
7. Nomination of directors for ensuing year.
8. Chairman to declare polls open at ———.
9. Unfinished business.
10. New business.
11. Closing of polls at ——— and announcement of result by the tellers.
12. Adjournment.

ARTICLE IX.

Amendments to By-Laws.

These by-laws may be altered, amended or added to by stockholders at any regular or extraordinary meeting, provided, copy of

proposed amendment shall be mailed to each stockholder of record at least ——— days prior to the meeting at which the same is to be acted upon.

SUGGESTIONS FOR ADDITIONAL BY-LAWS.

Cumulative Voting.—"In voting for directors, each stockholder may cast as many votes as shall equal the number of shares owned by him multiplied by the number of directors to be elected. He may cast all these votes for a single director, or a certain number for one director, and a less number for another, or divide them evenly among the entire number of directors to be elected, or among several of them at his option." (This clause enables the minority stock to secure representation on the board.)

Failure of Notice of Annual Meeting of Stockholders.—No failure of notice of any annual meeting of stockholders shall invalidate such meeting or any action taken thereat. (A similar provision may be adopted as to the regular monthly meeting of the Board of Directors.)

Lien on Stock for Indebtedness to the Corporation.—The corporation shall at all times have a first lien on all shares of stock issued by it, whether common or preferred, for any and all indebtedness of the holder of such shares to the corporation, and a statement of the effect of this by-law shall be printed on each certificate of stock issued by the corporation.

(6)
Corporate Acknowledgments.

Deeds may be acknowledged by attorneys appointed therein as follows:

And this Deed, further witnesseth: that the said ——— does hereby appoint ———, to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this Deed before any person having authority by the laws of the State of Maryland to take such acknowledgment, to the intent that the same may be recorded.

STATE OF MARYLAND, }
COUNTY OF } *ss.*

I HEREBY CERTIFY, That on this ——— day of ———, 19——, before the subscriber, a ——— of the State of Maryland, in and for ——— personally appeared ———, the attorney named in the foregoing Deed and by virtue and in pursuance of the authority therein conferred upon him, acknowledged said Deed to be the corporate act and deed of said ———.

———

Or such may be made by the president or vice-president of the company, as follows:

STATE OF MARYLAND, }
COUNTY OF } *ss.*

On this ———day of ———, 19——, personally appeared before me, a ——— of the State of Maryland, in and for ———, ———, the president (*or vice-president*) of the ———, which executed the foregoing instrument, and acknowledged the same to be the corporate act and deed of said ———.

———

(7)

Minutes of First Meeting of Stockholders.

First meeting of the stockholders of ———, held on the ——— day of ———, 19——, at ——— o'clock, at ———, in the city of ———, State of Maryland, pursuant to a written waiver of notice signed by all stockholders fixing said time and place.

The following stockholders were present in person, to wit: ———, ——— shares; ———, ——— shares.

The following stockholders were represented by proxy, to wit: ———, ——— shares; ———, ——— shares, being a majority of each class of stock.

Mr. ——— was chosen chairman of the meeting, and Mr. ———, secretary.

The secretary presented and read the waiver of notice of the meeting, which was ordered spread upon the minutes.

On motion duly made and seconded, it was

RESOLVED, That Messrs. ———, ——— be appointed a committee to report a form of by-laws. Messrs. ———, ——— thereupon reported the following form of by-laws, to wit:

(*See form of by-laws.*)

Whereupon upon motion duly made and seconded, it was

RESOLVED, That the by-laws reported by Messrs. ——— be and are hereby adopted.

Upon motion duly made and seconded, it was

RESOLVED, That the board of directors as named in the certificate of incorporation shall constitute the members of the board of directors for the ensuing year and until their successors are elected and qualify.

The chairman then submitted to the meeting the following proposition:

To the stockholders of ———.

The undersigned does hereby offer to sell, assign and transfer to your company the following described property, to wit: ——— ——— in consideration of the issue to me or my assigns of ——— shares of the preferred and ——— shares of the common stock of your company, of the par value of ——— dollars per share.

On motion duly made and seconded,

RESOLVED, Whereas the property described in the proposition of ———, is suitable for the purposes of this corporation, and whereas said property is of the full value of ——— dollars, that the proposition of ——— be and is hereby accepted, and the officers of this company be and they are hereby authorized and directed, upon the transfer of said property to this corporation, to issue to said ———, his nominee or assigns, ——— shares of the preferred and ——— shares of the common stock of this corporation as in said proposition set forth, and thereupon to file with the clerk of ——— Court the certificate required by law.

(*See form of certificate, infra.*)

Upon motion duly made and seconded,

RESOLVED, Whereas Mr. ——— has rendered to this corporation the following services, to wit: ———, and whereas said services are of the full value of ——— dollars; and whereas the said

——— has agreed to accept in full payment for said services, ——— shares of the common and ——— shares of the preferred stock of this corporation, that in consideration of said services, the officers of this company be and they are hereby authorized and directed to issue to said ———, ——— shares of the common and ——— shares of the preferred stock of this corporation, and thereupon to file with the clerk of ——— Court, the proper certificate therefor.

(*See form of certificate, infra.*)

———
Secretary.

(8)
Waiver of Notice of Meeting of Stockholders.

The undersigned, being all the stockholders of ———, a corporation incorporated under the laws of Maryland, hereby assent and agree that a meeting of the stockholders of said corporation shall be held at ———, in the State of Maryland, on the ——— day of ———, 19——, for the purpose of adopting by-laws and the transaction of other business.

We do hereby waive notice and the publication of notice of such meeting and agree that any business transacted at such meeting shall be as valid and effective as if held after notice duly given and published.

Witness our signatures, this ——— day of ———, 19——.

———

(9)
Minutes of First Meeting of Board of Directors.

First meeting of the board of directors of the ———, held at ———, in the ———, State of Maryland, on the ——— day of ———, 19 , at ——— o'clock.

Present: Messrs. ——— ——— ———

Constituting a majority of the board of directors.

Mr. ——— was chosen temporary chairman, and Mr. ———, temporary secretary of the meeting.

The secretary presented and read a waiver of notice of the meeting signed by all the directors and same was ordered spread upon the minutes.

(*See form of waiver, infra.*)

The secretary then presented to the meeting a certified copy of certificate of incorporation which had been filed with the Tax Commissioner of the State of Maryland on the ——— day of ———, 19——, and on motion duly made and seconded, it was

RESOLVED, That said certificate of incorporation be and is hereby accepted and ordered spread upon these minutes.

(*Set out certificate.*)

Upon motion duly made and seconded, it was

RESOLVED, That subscriptions to the stock of this company be received at par, payable in cash as called by the board of directors, or in such property or services as shall be agreed upon and the issue authorized by the affirmative vote of a majority of each class of the stock of this corporation outstanding and entitled to vote as provided by law.

Whereupon stock subscription books being open, the following subscriptions to stock at par, payable in cash as called by the board of directors, were received, to wit:

———

———

———

On motion duly made and seconded, the meeting thereupon adjourned to meet at ———, on the ——— day of ———, 19——, at ——— o'clock.

———

Secretary.

Pursuant to adjournment the board of directors reconvened at ———, on the ——— day of ———, 19——, at ——— o'clock.

Present: Messrs.

———

———

———

Mr. ——— in the chair. Mr. ———, secretary.

The secretary reported that at a meeting of the stockholders of said corporation held on the ——— day of ———, 19——, by-laws

had been adopted. The board of directors did thereupon proceed to the election of officers as provided in said by-laws, and the following gentlemen were unanimously elected officers of the company to serve until the next annual meeting and until their successors are elected and qualify:

President, ———; vice-president, ———; secretary, ———; etc.

On motion duly made and seconded,

RESOLVED, That the treasurer give a bond in the sum of ——— dollars, to be approved by the board.

On motion duly made and seconded,

RESOLVED, That the president and treasurer be and they are hereby authorized to issue certificates of stock in the following forms:

(*See Forms, infra.*)

On motion duly made and seconded,

RESOLVED, That until otherwise ordered, ——— be and is hereby designated as the depository of the funds of this company.

Upon motion duly made and seconded,

RESOLVED, That Messrs. ——— ——— be appointed members of the executive committee.

On motion made and seconded,

RESOLVED, That the principal office of the company in the State of Maryland be located at ———, and that in addition thereto an office of the company be established and maintained at ——— in the State of ———, and that meetings of the board of directors may be held at either office as determined by the president, or elsewhere as the board of directors shall from time to time order.

———

Secretary.

NOTE—This form is intended for use when it is desired to perfect the organization of the company by holding stockholders' meeting and adopting by-laws and providing for the issuance of stock for property or services before the final adjournment of the directors' meeting; the stockholders' meeting being held during the adjournment of the directors' meeting. If it is desired, however, to postpone the stockholders' meeting to some more convenient time, the organization of the company by the board of directors may temporarily be effected by the election of president, secretary and treasurer as provided by the general incorporation law and by the adoption of appropriate resolutions for the execution of stock certificates, notes, checks, etc. Of course, no subscriptions to stock payable in property or services can be taken, nor any by-laws adopted except at meeting of stockholders.

(10)
Waiver of Notice of First Meeting of Directors.

We, the undersigned directors of the ———, a corporation incorporated under the laws of the State of Maryland, hereby waive notice of the time and place of the first meeting of the board of directors and of the business to be transacted at said meeting.

We designate the ——— day of ———, 19——, at ——— o'clock as the time, and the ———, in the State of ———, as the place of said meeting, the purpose of said meeting being the organization of said corporation, the authorization of the issue of stock of said corporation, the authorization of the purchase of property necessary for the business of said corporation, the election of officers and the transaction of such other business as the board may deem proper.

Witness our signatures this ——— day of ———, 19——.

———

———

(11)
Subscription List.

We, the undersigned, in consideration of our mutual promises, do hereby severally agree to and with each other, and also to and with the said corporation when it shall come into being, that we will take the number of shares of stock of the said corporation, at the par value of ——— dollars each, set opposite our respective names:

Dated at ———, State of Maryland.

Date	Name of Subscriber	Address to which Notices to be sent	No of Shares (and class)	Amount of Subscription	Remarks

(12)

Formal Subscription Agreement.

WHEREAS, It is proposed to form a corporation under the laws of the State of ———, to be known as ———, or by any any other suitable name, the object of which corporation is ——— with power to do anything directly or collaterally connected with such principal purpose, and,

WHEREAS, It is proposed that such Company shall have a capital stock of $——— to be divided into ——— shares of the par value of $——— each;

NOW, THEREFORE, We, the undersigned, in consideration of our mutual promises, and $1.00 in hand paid, the receipt of which is hereby acknowledged as well as other valuable considerations, do severally agree to and with each other to take the number of shares in said corporation set opposite our respective names below, and to pay therefor the sum of $——— per share, such payments to be made to such corporation when formed, at the dates and in the installments following:

Upon payment in full of said amount, we, or our personal representatives, or assigns, to receive certificates of stock in said corporation to the amount of our subscription, and until such stock is paid for in full shall be given receipts for amounts paid. It is understood that this subscription is not to be operative unless the minimum of $——— is subscribed in good faith to the capital stock.

IN TESTIMONY WHEREOF, We have hereunto set our names and affixed our seals at ——— this ——— day of ———, 19——.

Name.	Residence.	No. of Shares	Kind of Shares
———(Seal)			
———(Seal)			

———(Seal)

———(Seal)

———(Seal)

(13)
Assignment of Subscription.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned ———, in consideration of $1.00 to me in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned and transferred, and by these presents, do sell, assign, transfer and set over unto ——— all my right, title and interest as incorporator and as a subscriber to ——— shares of the (common or preferred) stock of the ——— Company, and I do hereby request and direct said Company to issue a certificate for the said ——— shares standing in my name, to the said ——— or such other person as he may name. This assignment to take effect up the acceptance thereof by the Company.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ——— day of ———, 19——.

————(Seal)

Sealed and delivered in the presence of ———.

In consideration of the above transfer of subscription I hereby accept and assume all liabilities, obligations, and duties attached to the said subscription of the said ——— shares of stock and I waive notice of all proceedings had and taken prior to, and including the meeting of stockholders at which this transfer is presented.

Dated at ——— this ——— day of ———, 19——.

————(Seal)

Witness:

————

Accepted:

————Company.

By————

(14)
Certificate of Common Stock.

(Number.) (Shares.)

Incorporated under the laws of Maryland.
Name of Corporation.
Capital Stock, $——.

THIS CERTIFIES that —— is the owner of —— shares of the capital stock of ——, transferrable on the books of the corporation in person or by attorney upon surrender of this certificate.

IN WITNESS WHEREOF, The duly authorized officers of this corporation have hereunto subscribed their names and caused the corporate seal to be hereto affixed, this —— day of ——, A. D., 19——.

(Corporate Seal.)

Shares $—— each.

(15)
Certificate of Preferred Stock.

(Number.) (Shares.)

Incorporated under the laws of Maryland.
Name of Corporation.
Capital Stock, $——.

Common Stock, $——. Preferred Stock, $——.

THIS IS TO CERTIFY that —— is entitled to —— fully paid and nonassessable shares, of the par value of $—— each, of the preferred capital stock of ——, transferrable on the books of the corporation in person or by attorney upon the surrender of this certificate.

The holders of preferred stock are entitled to receive, when and as declared by the board of directors, out of the surplus or net profits of the corporation, cumulative dividends at the rate of and

not exceeding ——— per centum per annum, before any dividend shall be paid on the common stock, and are also entitled to receive, upon liquidation, dissolution or winding up, the par value thereof and all dividends unpaid thereon before any amount shall be paid to the holders of the common stock.

Whenever in any year the full annual dividend on the preferred stock shall have been paid or declared as payable and set apart and any dividends accumulated and unpaid thereon shall have been fully paid, the board of directors of the corporation may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits; provided, however, that no dividend on the common stock shall at any time be paid, either in cash or otherwise, if such payment would reduce the actual surplus of the corporation to an amount less than ——— per centum of the par value of the total amount of the issued and outstanding preferred stock, nor, whenever the actual surplus of the corporation is less than ——— per centum of the par value of the issued and outstanding preferred stock, shall any dividend on the common stock be declared or paid unless at the time of the declaration thereof there shall be added to the surplus out of the net profits an amount equal to not less than ——— of the total common stock dividend declared.

The preferred stock shall be redeemable, in whole or in part, at the option of the corporation, upon any dividend paying dates at any time after ——— years from the issue thereof, at the price of ——— dollars ($———) in cash and interest thereon. In case of the redemption at any time of less than the total outstanding amount of the preferred stock, such redemption shall first be made pro rata among the then holders of the preferred stock.

The authorized amount of the preferred stock shall not be increased nor shall any stock having preference or priority over, or equality with, the preferred stock either in respect of dividend, assets or otherwise be authorized or issued by the corporation, nor shall any mortgage or bonded indebtedness be created by it except with the consent in writing, or by vote at a meeting duly called, of the holders of not less than two-thirds in amount of both the preferred and common stocks issued and outstanding; provided, however, that the board of directors shall have power, without any consent, at any time or times, to authorize the execution and delivery of purchase money mortgages covering specific properties that may

be purchased by the corporation or the assumption by it of obligations secured by mortgage on such properties.

IN WITNESS WHEREOF, The duly authorized officers of the corporation have hereto subscribed their names and caused the corporate seal to be hereto affixed this ——— day of ———, A. D., 19——.

(Seal.) ———————

———————

NOTE.—The above certificate as required by law includes all the provisions with reference to preferred stock contained in the certificate of incorporation, (Form 2, supra.) It should be amended to suit any changes in such certificate.

(16)
Assignment and Power of Transfer.

FOR VALUE RECEIVED, ——— hereby sell, assign and transfer unto ——— ——— shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ——— my Attorney to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises.

Dated ———, 19——.

In presence of ——————— ———————

(17)
Proxy.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, being the owner of ——— shares of the capital stock of the ——— Company, do hereby constitute and appoint ——— my true and lawful attorney, in my name and place and stead to vote upon such stock owned by me, or standing in my name, as my proxy, at the meeting of the stockholders of the said Company to be held at the Company's office on the ——— day of ———, 19——,

or on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes I am now or may then be entitled to cast, hereby granting said attorney full power and authority to act for me and in my name at the said meeting, or meetings, in voting for directors of said Company, or otherwise, and in the transaction of any other business which may come before the meeting, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney may do in my name, place and stead.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ——— day of ———, 19——.

————(Seal)

Witness:

———

(18)

Certificate of Payment for Stock in Property or Services.

THIS IS TO CERTIFY that at a meeting of the stockholders of the ———, called in the manner provided by law for the calling of extraordinary meetings, and held on the ——— day of ———, 19——, it was declared by the affirmative vote of a majority of all of the stock outstanding and entitled to vote (not counting the stock of any person interested in said property or in the rendition of said services, nor any stock that is to be paid for by the rendition of services) that the following described services shall be rendered to and adopted by the corporation, that the following described property is suitable for the purposes for which the corporation was organized, that such property is of the value of ——— dollars, and such services of the value of ——— dollars, and that the same shall be paid for by the issuance of the stock of the corporation in corresponding amounts.

AND IT IS FURTHER CERTIFIED that in pursuance of the said declarations, the said corporation has issued ——— shares of its capital stock, of the par value of ——— dollars each, to ———.

who has conveyed the property and rendered (or agreed to render) the services, hereinafter described, to the said corporation.

DESCRIPTION OF PROPERTY AND SERVICES.

_____

_____

Witness the signature of the President (or Vice-President) and Secretary of the said corporation, this ——— day of ———, 19——.

_____

President.

_____

Secretary.

STATE OF MARYLAND, }
COUNTY OF } *ss.*

I HEREBY CERTIFY, That on this ——— day of ———, 19——, before me, the subscriber, a ——— of the State of Maryland in and for ———, personally appeared ———, the treasurer of ———, and made oath in due form of law that the matters and facts in the foregoing statement are true.

_____

(19)

Annual Certificate to be Filed with Secretary of State by Foreign Corporation.

The ——— of ———.

To the Secretary of State, Annapolis, Maryland:

The ———, a corporation organized and existing under the laws of the State of ———, in compliance with the requirements of Section 93 of Article 23 of the Code of Public General Laws of Maryland, said article being the general corporation law of said State, does herewith file a certified copy of its charter and make the following certificate:

The name of the corporation is: ———.

The names and addresses of its officers and directors are: (*Here insert names and addresses of officers and directors.*)

The principal office of said corporation in the State of Maryland is located at ———, and in the State of its incorporation, at ———.

The amount of the capital stock of said corporation authorized by law is $———, consisting of ——— shares of preferred stock of the par value of $——— each, and ——— shares of common stock of the par value of $——— each.

The amount of capital stock of said corporation actually issued is $———, of which ——— shares are preferred stock and ——— shares are common stock; the amount paid in on said shares of capital stock is $———, being $——— on each share of preferred stock and $——— on each share of common stock.

The names and addresses of the shareholders of said corporation residing in the State of Maryland, and the number of shares of the stock of said corporation held by each, are as follows: (*Here insert name, address and number of shares.*)

The amount of capital employed in the State of Maryland by said corporation is $———.

The said corporation hereby appoints ———, residing at ———, Maryland, as its agent in said State, upon whom legal process may be served.

The said corporation hereby declares its willingness that so long as any liability remains outstanding against it in the State of Maryland, the authority of such agent shall continue until a substitute is appointed and certified to the Secretary of State.

IN TESTIMONY WHEREOF, I, ———, president (or treasurer) of said corporation, have hereunto set my hand and caused the seal of the said corporation to be hereto affixed, this ———, day of ———, 19——.

———

(Corporate Seal.) **President.**

STATE OF }
CITY OF } *ss.*

Personally appeared before me, the undersigned, a Notary Public in and for the ——— and State aforesaid, the above ———, president (or treasurer), of the corporation making the foregoing statement and who signed the same, and made oath in due form of law

that the facts and figures set forth in said statement are true to the best of his knowledge and belief.

Sworn to and subscribed before me, this ——day of ——, 19——.

(Notarial Seal.) Notary Public.

To the ——: I hereby accept the appointment as the agent of your company to reside in the State of Maryland, upon whom legal process may be served.

STATE OF MARYLAND }
CITY OF } ss.

Personally appeared before me, the subscriber, a notary public in and for the State and ——aforesaid, the above named ——, who acknowledged the signing of the above acceptance as his free act and deed for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal, this —— day of ——, 19——.

Notary Public.

(Notarial Seal.)

(20)

Letter Offering to Sell (to be read at the first meeting of the Incorporators) Where Corporation is Organized to Take Over Assets of Existing Business.

To the Stockholders and Directors of the —— Company, Inc.:
——City, ——State.

Gentlemen:—We hereby offer to sell you our plant for the manufacture of —— located in the City of ——, State of ——, including with said plant, all machinery, tools, apparatus and materials, raw or manufactured, cash on hand, accounts outstanding, the whole being sold as a going concern, all of said plant and property being free and unencumbered, for $—— of the capital stock of your Company, which said stock is to be issued to

us full paid and non-assessable, in the following proportion: To the undersigned, ———, ——— shares, par value, $——— each; to the undersigned, ———, ——— shares, par value, $——— each; to the undersigned, ———, ——— shares, par value, $——— each; to the undersigned, ———, ——— shares, par value, $——— each.

We do hereby agree, upon delivery of certificates of stock as aforesaid, to execute such deeds and assignments of the above plant and property as may be satisfactory to your attorneys.

Respectfully,

———

(21)
Resolutions of Stockholders Relative to Offer of Property.
(Passed at First Meeting.)

The secretary then read a proposition tendered by the ———, offering to sell to the corporation certain property therein described, in exchange for ——— shares of the stock of the corporation, to be issued to themselves or their assigns.

Upon motion of ———, the following preamble and resolutions were adopted by the affirmative vote of a majority of all the stock outstanding, not counting the stock of any person interested in said property, or to be paid for by the rendition of services:

WHEREAS, A proposition has been received from the Messrs. ———, offering to sell and convey to this corporation the assets of their said business as described in their offer, said property to be paid for by the issuance to them of full paid stock of the corporation of the par value of $———; and,

WHEREAS, It appears to the stockholders and incorporators of this company that the said property is of the value of the stock proposed to be given in payment therefor, and that it is suitable and necessary for the purposes for which the corporation is organized,

THEREFORE, BE IT RESOLVED, That the board of directors be and they are hereby authorized, in their discretion, to accept said proposition, and to purchase the said property, and to issue stock in payment therefor in accordance with the terms of the offer, a copy of which is appended to these minutes.

(*Same Subject.*)

(22)

Resolutions of Directors.

(*To be adopted at first meeting of directors.*)

On motion of ——— the following preamble and resolutions were unanimously adopted:

WHEREAS, A proposition has been received from the ———, consisting of ———, offering to sell, transfer and assign to this Company the assets of their business, the said property to be paid for by full paid and non-assessable stock of this company of the par value of ———, to be issued to them or their assigns; and,

WHEREAS, The incorporators and subscribers to the capital stock of this company, in meeting assembled, on the ——— day of ———, 19——, passed a resolution reciting that in their judgment, the said proposition was a reasonable one, and that the value of the property offered was equal to that of the stock proposed to be taken in payment therefor, and that such property was desirable and necessary for the purposes of the company and authorizing and instructing this board, in their discretion, to accept said proposition and purchase the property above mentioned upon the terms thereof, and to issue stock in payment thereof in accordance with said proposition; and,

WHEREAS, In the judgment of this board, the said property is of the reasonable value of ———, and is desirable and necessary for the purposes of the company and the said proposition should be accepted;

NOW, THEREFORE, BE IT RESOLVED, That the said proposition be, and it is hereby accepted, and the proper officers of this company are hereby authorized and directed to receive the duly executed transfers and assignments of said property, and to issue in exchange therefor certificates of the capital stock of this company to the par value of ———, full paid and non-assessable, in the names of ——— or of such persons as they may designate in writing to receive the same.

(23)

Bond to be Given Upon Issue of New Certificate Where Original Has Been Lost or Mislaid.

KNOW ALL MEN BY THESE PRESENTS, That we, ——, of ——, as principal, and ——, of ——, as surety, are held and firmly bound unto the —— Company, incorporated under the laws of the State of —— in the sum of $——, to be paid to the said company, for which payment, well and truly to be made, we bind ourselves, and each of us, and our personal representatives and assigns, firmly by these presents.

IN TESTIMONY WHEREOF, We have hereunto signed our names, and affixed our seals, this —— day of ——, 19——.

WHEREAS, The said —— is, according to the books of this company, the legal owner of certificate number ——, for —— shares of the capital stock of this company, which said certificate is claimed by him to have been lost or mislaid; and,

WHEREAS The said —— is desirous of having a new certificate issued to him in lieu of said lost certificate;

NOW THEREFORE, The condition of the above obligation is such, that if the above principal, his personal representatives and assigns, shall at all times hereafter indemnify and save harmless the —— Company, its successors and assigns against any and all actions, proceedings, claims and demands against said company in consequence of the issue of said certificate, and shall protect the company against any and all costs, and expenses, which may be hereafter incurred on account of said issue; then this obligation to be null and void, otherwise to be and remain in full force and virtue.

Witness our hands and seals this ——day of ——, 19——.

——————(Seal)

——————(Seal)

Signed, sealed and delivered in the presence of ——.

(24)

Directors' Resolution.

Declaring Dividend.

RESOLVED, That the sum of ——— Dollars be and is hereby appropriated from the net profits of this company for the payment of a dividend of ——— per centum upon its outstanding stock, said dividend to be due and payable on the ——— day of ———, 19——.

RESOLVED, FURTHER, That the treasurer of this company be authorized and directed to notify the stockholders of this declaration of dividend, and to pay same upon the date mentioned.

(25)

Voting Trust Certificate.

No. ———. ——— Shares.

This is to certify that ———, his personal representatives, and assigns, are entitled to ——— shares of the par value of $——— each, of the beneficial interest in the capital stock of the ——— Company, certificates for which have been issued to the undersigned as trustees under and in pursuance of a certain trust agreement made between all the stockholders of said company and ourselves as trustees, dated ———, 19——.

The holder of this certificate is entitled to the beneficial right and interest provided in and by said trust agreement, including a proportionate share of all dividends declared and paid on the stock of said company held in trust as aforesaid, less his proportionate share of any expenses incident to this trust.

The holder of this certificate has constituted the undersigned trustees his true and lawful attorneys and proxies to vote his holdings as fully and completely as he could do, on any and all questions, including a sale or mortgage of the entire assets, franchises and patents of said corporation. The holder of this certificate agrees not to sell the beneficial interest in said company owned by him or any part thereof, except in the manner provided for selling the stock of this company.

The trust hereby created shall continue until the ——— day of ———, 19——. Upon the determination of the said trust, the said

trustees shall assign and transfer to the then holders of the trust certificates, the amount of stock to which each holder thereof shall be entitled, upon the surrender of his trust certificate or certificates. The holder of this certificate, by receiving same, consents to all provisions hereof.

In witness thereof, the said trustees have hereunto signed their names and affixed their seals on the ——— day of ———, 19——.

———(Seal)
———(Seal)
———(Seal)

(26)
Transfer Record.

Entered Stock Register Page	Transfer No.	Surrendered		Re-issued	
		No. of Certificate	No. of Shares	No. of Certificate	No. of Shares

I hereby surrender stock certificate No. of (Name of Company) for shares, and certify that I have transferred shares thereof to to whom I authorize new certificate to be issued.

Dated at , this day of , 19 .

(Signed) (Seal)

Witness:

(27)
Stock Register.
(Arrange in Alphabetical Order.)

Stock Originally Issued *To or Transferred From*										Stock Transferred *To*								
No. of Certificate	Amount paid thereon	Date of Certificate			NAME OF STOCKHOLDER If Original, enter accordingly	ADDRESS	Ledger Folio	Number of Shares	Balance after Transfer	Name of Stockholder to whom Stock is Transferred	ADDRESS	Ledger Folio	Date of Transfer			Number of Shares Transferred	Number of New Certificate
		Month	Day	Year									Month	Day	Year		

(28)
Dividend Record.

Dividend No. ——— of ——— per cent. or $——— per share of the Capital Stock of ———, declared ———, 19——, and Payable ———, 19——.

No. of Certificate	NAME OF STOCKHOLDER	ADDRESS	No. of Shares	Par Value per Share	Amount Dividend per Share	Total Dividend Paid	DATE OF PAYMENT			Received amount of Dividend opposite my name on date written	If signed by agent or attorney—Name
							Month	Day	Year		

(29)
Stockholders' Ledger.

	No. Certificate	No. Shares	Page Register	DEBITS		CREDITS		Surrendered Certificate		No. Transfer Record
				Total Par Value of Stock	Amt. Drawn on Dividend	Amt. Paid for Stock, Cash, Mdse. or Notes	Amt. Dividends	No.	No. Shares	

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